IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS A. COUGHLIN, Commissioner, New York State Department of Correctional Services; STEPHEN DALSHEIM, Superintendent, Ossining Correctional Facility; EUGENE S. LEFEVRE, Superintendent, Clinton Correctional Facility; and HAROLD SMITH, Superintendent, Attica Correctional Facility,

Petitioners,

vs.

THOMAS BENJAMIN, ERROL DUNKLEY, FRANK FORREST, BARRINGTON GRAY, NEWTON HANNON and MARTIN SPENCE, on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General
and Counsel of Record

HOWARD L. ZWICKEL
Assistant Attorney General
In Charge, Litigation Bureau

DENNIS J. SAFFRAN
Assistant Attorney General

Of Counsel

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
120 Broadway
New York, New York 10271
(212) 341-2620

QUESTIONS PRESENTED

1. Is a prison directive that requires incoming inmates to receive an initial haircut for the purpose of taking a short-hair identification photograph for use in the event of their escape, but allows the inmates to regrow their hair to any length they wish after this photograph, "reasonably related to legitimate penological interests" and thus constitutionally permissible under *Turner v. Safley* and *O'Lone v. Shabazz*?

2. Was it proper to invoke offensive non-mutual issue preclusion to enjoin enforcement of the initial haircut requirement against the plaintiff class, based upon two state court actions decided under the *pre-Turner/O'Lone* legal standard, despite the intervening sea change in the governing law brought about by these decisions, other state court decisions upholding the challenged regulation, the individualized nature of the earlier actions, and the defendants' governmental status?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

THOMAS A. COUGHLIN, Commissioner, New York State Department of Correctional Services; STEPHEN DALSHEIM, Superintendent, Ossining Correctional Facility; EUGENE S. LEFEVRE, Superintendent, Clinton Correctional Facility; and HAROLD SMITH, Superintendent, Attica Correctional Facility,

Petitioners,

vs.

THOMAS BENJAMIN, ERROL DUNKLEY, FRANK FORREST, BARRINGTON GRAY, NEWTON HANNON and MARTIN SPENCE, on behalf of all others similarly situated,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this action on May 18, 1990.

OPINIONS BELOW

The decisions of the district court are reported at 643 F. Supp. 351 (S.D.N.Y. 1986) and 708 F. Supp. 570 (S.D.N.Y. 1989), and are reproduced in the appendix to this petition at 18a-30a and

34a-46a. The decision of the court of appeals is reported at 905 F.2d 571 (2d Cir. 1990) and is reproduced in the appendix at 1a-17a.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1990. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

STATE DIRECTIVE INVOLVED

New York State Department of Correctional Services Directive No. 4914 (Jan. 5, 1984) [superceded] provides in pertinent part[1]:

> Males received as new commitments shall get an initial haircut . . . for reasons of health and sanitation as well as to permit the taking of the initial identification photograph. Hair length upon completion of this initial haircut shall not exceed one (1) inch on any part of the head.
>
> * * *
>
> After the initial haircut . . . [h]air may be permitted to grow over the ears to any length desired by the inmate.

[1] Directive No. 4914 was revised in 1986 under constraint of the preliminary injunction issued by the district court in this case. The original Directive, which is at issue here, is reprinted in its entirety in the appendix at 47a-49a. The current Directive is reprinted at 50a-54a.

STATEMENT OF THE CASE

This is a class action brought pursuant to 42 U.S.C. § 1983 and 28 U.S.C. § 1343(a)(3) by Rastafarian inmates in the custody of the New York State Department of Correctional Services ("DOCS"). In their complaint, plaintiffs (respondents here) claimed that various DOCS policies violated the free exercise clause of the first amendment and the equal protection clause of the fourteenth amendment. The district court and the court of appeals sustained three of the four challenged DOCS policies,[2] but held that the DOCS requirement that incoming inmates receive an initial haircut for the purpose of an identification photograph could not be constitutionally applied to Rastafarians under the first amendment.

Rastafarianism is a Jamaican-based religion whose central belief is that Haile Selassie, the former emperor of Ethiopia, is God. Among its tenets are that men should not cut or comb their hair. Many Rastafarian men therefore let their hair grow in unfettered strands known as "dreadlocks." *See generally Reed v. Faulkner*, 842 F.2d 960, 962 (7th Cir. 1988); Note, *Soul Rebels: The Rastafarians and the Free Exercise Clause*. 72 Geo. L.J. 1605, 1606-09 (1984).

Plaintiffs challenge DOCS Directive 4914 as violative of this practice and thus of the first amendment. Directive 4914 requires in pertinent part that all incoming male inmates be given an initial haircut (to a hair length not to exceed one inch) for the purpose of taking an identification photograph for use in the event of their escape. Appendix ("App.") 48a. After this initial identification photograph, inmates may regrow their hair "to any length desired." App. 48a. However, DOCS believes that it must have a short-hair photograph on file in order to apprehend

---

[2] The courts below held that DOCS was not constitutionally required to allow plaintiffs to conduct their own religious services without the guidance of a "free-world" sponsor, to allow the unrestricted wearing of a large religious head covering known as a "crown," or to provide plaintiffs with a special "Ital" diet.

a prisoner who escapes and cuts his hair. J.A. 243, 272-85, 333.[3]

Plaintiffs commenced this action in 1979. The case remained dormant from 1980 to 1985 while settlement was discussed unsuccessfully. App. 19a. In August, 1986, the district court granted plaintiffs' motion for a preliminary injunction prohibiting DOCS from enforcing the initial haircut requirement against incoming Rastafarian inmates. 643 F. Supp. 351 (S.D.N.Y. 1986), App. 18a-30a. The court based this decision entirely on the doctrine of offensive non-mutual collateral estoppel. It gave preclusive effect to two New York State court cases, *Lewis v. Commissioner of the Department of Correctional Services*, No. 85-11167 (N.Y. Sup. Ct. Queens Co. Aug. 1, 1985) [App. 55a-60a], *aff'd sub. nom.*, *People v. Lewis*, 115 A.D.2d 597, 496 N.Y.S.2d. 258 (2d Dep't 1985), *aff'd*, 68 N.Y.2d 923, 510 N.Y.S.2d 73 (1986), and *Overton v. Department of Correctional Services*, 131 Misc.2d 295, 499 N.Y.S.2d 860 (Sup. Ct. Kings Co. 1986), *aff'd*, 133 A.D.2d 744, 520 N.Y.S.2d 32 (2d Dep't 1987), *appeal dismissed as moot*, 72 N.Y.2d 838, 530 N.Y.S.2d 551 (1988), that had held the haircut requirement to be unconstitutional as applied to the individual Rastafarian plaintiffs in those actions.

The *Lewis* and *Overton* courts had evaluated the haircut requirement under the "least restrictive alternative" test of *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1029 (2d Cir. 1985), which was later explicitly rejected by this Court in *O'Lone v. Shabazz*, 482 U.S. 342, 349 n.*. As discussed *infra*, in *O'Lone* and in *Turner v. Safley*, 482 U.S. 78 (1987), this Court rejected the strict scrutiny standard of *Abdul Wali* and similar cases in favor of a more deferential inquiry into whether a prison regulation is "reasonably related to legitimate penological interests."

In June, 1987, defendants (petitioners here) moved to vacate the preliminary injunction on the ground that *Turner* and

---

[3] Citations to portions of the Joint Appendix filed in the court of appeals that are not reprinted in the Appendix to this petition are indicated by "J.A."

O'Lone had altered the legal standard applicable to prisoners' constitutional claims and thus eliminated any possible preclusive effect of the state court actions decided under the rejected standard. The district court reserved decision on this motion until after trial, but ordered that evidence be presented on the merits of the haircut issue as well as the other issues at trial, in case the court should conclude that preclusion was no longer appropriate.

At a four-day bench trial held in August and September, 1987, corrections officials testified that a short-hair photograph is necessary to prevent an escaped inmate from evading detection simply by cutting his hair, and that plaintiffs' suggested alternative of photographing inmates with their hair pulled back did not adequately reveal a person's features for identification purposes. J.A. 202, 281-83, 330-32. The DOCS Deputy Commissioner responsible for security testified that only a short-hair photograph accurately reveals a person's cranial and facial features, including configuration and shape of the head, scars and other unusual characteristics. J.A. 281-83. Plaintiffs offered no testimony to rebut the Deputy Commissioner's assessment.

In its post-trial decision, issued in March, 1989, the district court invalidated the haircut requirement on two grounds. The court first reaffirmed its earlier preclusion ruling without addressing the question of the effect on preclusion of the intervening change in the law brought about by *Turner* and *O' Lone*. 708 F. Supp. at 573, App. 22a-23a. Despite this preclusion holding, the court proceeded to reach the merits of the haircut issue. While conceding that "there is a rational connection between the haircut requirement and the security objective put forth by defendants to justify it," and that the fundamental requirement of *Turner* and *O'Lone* was thus satisfied, the court nonetheless discounted the testimony of corrections officials and held the haircut rule invalid because in its opinion photographing inmates with their hair pulled back was "adequate for security purposes." 708 F. Supp. at 573, App. 23a.

The court of appeals affirmed the decision of the district court on both the preclusion issue and the merits. 905 F.2d at 575-77, App. 6a-10a. As to preclusion, the court devoted only a single paragraph to defendants' central contention that the change in the governing constitutional standard enunciated by this Court in *Turner* and *O'Lone* defeated collateral estoppel. 905 F.2d at 576, App. 9a. The court cited dictum in *Lewis* that the plaintiff there would have prevailed even under a deferential standard of review akin to that later established in *Turner* and *O'Lone*. 905 F.2d at 576, App. 9a. As argued *infra*, the court ignored hornbook law that such dictum is without preclusive effect as it is unnecessary to the judgment in the earlier case.

Turning to the merits, the court acknowledged that under *Turner* "[g]reat deference must be accorded" to DOCS' security concerns. 905 F.2d at 577, App. 10a. Nonetheless, it placed the burden of proof on DOCS to establish the inadequacy for security purposes of plaintiffs' suggested alternative to the haircut requirement, and accepted the conclusion of the district court that "tying plaintiffs' hair in pony tails adequately accommodates the interests of prison authorities." App. 10a. The court made no mention of the directly conflicting decisions of the courts of appeals for the third, sixth, seventh and eleventh circuits (discussed *infra*) upholding more onerous prison haircut requirements against free exercise clause attack.

The court also appears to have misapprehended the purpose of the haircut requirement. The court stated that "[a]lthough length of hair makes identification difficult upon escape, a photograph of a Rastafarian when his hair is short would create the same identification problems, because he certainly will regrow his hair." App. 10a. It is not the length of an escaped prisoner's hair that makes detection difficult, however, but the fact that without a short-hair photograph the authorities will have no means to identify the escapee should he cut his hair. That is why DOCS allows inmates to regrow their hair to any length desired once it has taken a short-hair photograph.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS IN *TURNER V. SAFLEY* AND *O'LONE V. SHABAZZ* AND WITH THE DECISIONS OF FOUR OTHER COURTS OF APPEALS.

The court of appeals improperly applied the standard for the assessment of prisoners' constitutional claims set forth by this Court in *Turner* and *O'Lone*, and its decision directly conflicts with decisions of four other courts of appeals upholding even more restrictive prison haircut requirements against free exercise clause challenges.

In *Turner* and *O'Lone* this Court held that a challenged prison regulation "is valid if it is reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89; *O'Lone*, 482 U.S. at 349. The Court rejected the application of "strict scrutiny analysis" or a "least restrictive alternative test", *Turner*, 482 U.S. at 90, in order "to ensure that courts afford appropriate deference to prison officials". *O'Lone*, 482 U.S. at 349.

The *Turner* Court set forth a four-factor analysis for determining the reasonableness of a prison regulation:

1- Whether there is a " 'valid rational connection' between the . . . regulation and the legitimate governmental interest put forward to justify it." 482 U.S. at 89 (quoting *Block v. Rutherford*, 468 U.S. 576, 586 (1984)).

2- "[W]hether there are alternative means of exercising the right that remain open to prison inmates." 482 U.S. at 90. However, the Court "made clear in *Turner* and *O'Lone* that 'the right' in question must be viewed sensibly and expansively." *Thornburgh v. Abbott*, 490 U.S.____, 109 S.Ct. 1874, 1883 (1989). The inmate need not have other means of engaging in the particular activity at issue, but only in the more general right that is allegedly infringed by restriction or prohibition of the activity.

See id.. Thus, in a free exercise case such as the present one, the proper inquiry is whether the plaintiffs are "deprived of all forms of religious exercise." *O'Lone*, 482 U.S. at 352.

3- "[T]he impact [that] accommodation of the asserted constitutional right will have on guards and other inmates, and on the allocation of prison resources generally." *Turner*, 482 U.S. at 90.

4- Whether there are "obvious, easy alternatives" available to the prison administration for achieving its objective, entailing "*de minimis* costs to valid penological interests." *Id.* at 91. The Court stressed that "[t]his is not a 'least restrictive alternative' test: prison officials do not have to set up and then shoot down every conceivable method of accommodating the claimant's constitutional complaint." *Id.* at 90-91. Moreover, it is improper to "plac[e] the burden on prison officials to disprove the availability of alternatives." *O'Lone*, 482 U.S. at 350. Rather, plaintiffs challenging a prison regulation bear the burden of showing that obvious and easy alternatives are available. *See id.*

The court of appeals failed to follow the *Turner-O'Lone* analysis, and also ignored the unanimous caselaw in the other circuits upholding more restrictive haircut requirements imposed by other correctional systems. The court did not address the first and third factors (rational connection to valid penological interest and impact of accommodation) at all, though it did acknowledge "the existence of reasonable security concerns", 905 F.2d at 576, App. 9a-10a, thus implying that the first factor was satisfied.

Regarding the second factor (alternatives available to inmates) the court downplayed the significance of the plaintiffs' right to regrow their dreadlocks to any length desired after the initial haircut, stating that "this 'misses the point of the violence done to [an inmate's] religious beliefs when his hair is cut.' " 905 F.2d at 577, App. 10a (quoting the opinion of the district court, 708 F. Supp. at 573, App. 23a). Thus, the court disregarded this Court's admonition in *Abbott* and *O'Lone* to view the right in question expansively by focusing not on the particular practice at

issue but rather on the question of whether the plaintiffs are "deprived of all forms of religious exercise." *O'Lone*, 482 U.S. at 352.

The court placed almost exclusive emphasis on the fourth factor (alternatives available to prison officials). The court stated that photographing inmates with their hair pulled back "adequately accommodates the interests of prison authorities." 905 F.2d at 577, App. 10a. In direct contravention of this Court's holding in *O'Lone*, the court placed the burden of proving the unacceptability of this alternative on DOCS. App. 10a ("Defendants . . . have failed to establish" the inadequacy of a tied-back hair photograph). The court thus discounted the unrebutted testimony of the DOCS Deputy Commissioner responsible for security that this alternative is inadequate because only a short-hair photograph accurately reveals a person's cranial and facial features, including configuration and shape of the head, scars, and other unusual characteristics, in a manner sufficient for identification purposes. J.A. 281-83. The court's conclusion directly conflicts with the conclusion of the court of appeals for the sixth circuit which, faced with the identical issue, found that a pulled-back hair photograph was an inadequate alternative to a short-hair photograph because "there is little doubt that a person with long hair, *even if pulled back in a pony tail*, looks quite different from a person with short hair." *Pollock v. Marshall*, 845 F.2d 656, 659 (6th Cir. 1988) (emphasis added), *cert. denied*, 109 S. Ct. 239 (1988).

As *Pollock v. Marshall* suggests, the decision of the court of appeals in the present case is directly at odds with decisions of other courts of appeals. Indeed, the conflicting decisions in the other circuits have rejected free exercise clause challenges to far more burdensome haircut requirements than that imposed by DOCS. The courts in these cases have upheld hair length restrictions requiring the plaintiffs there to cut their hair regularly in violation of their religious beliefs, not simply to cut it once for an identification photograph. *Pollock*, 845 F.2d 656 (upholding application of hair length regulation to adherent of Lakota American Indian religion); *Reed v. Faulkner*, 842 F.2d

960, 963 (7th Cir. 1988) ("requiring prisoners to wear their hair short makes it harder for them to change their appearance, should they escape, by cutting their hair short"; Rastafarian plaintiff);[4] *Wilson v. Schillinger*, 761 F.2d 921, 928 (3d Cir. 1985) ("Directive . . . may be enforced against plaintiff though it conflicts with his religious beliefs because the directive responds to potential dangers to prison security"; Rastafarian plaintiff); *accord Cole v. Flick*, 758 F.2d 124 (3d Cir. 1985); *Dreibelbis v. Marks*, 742 F.2d 792 (3d Cir. 1984).

Even courts applying a stringent *pre-Turner* "least restrictive alternative" test have upheld such hair length regulations. *Martinelli v. Dugger*, 817 F.2d 1499 (llth Cir. 1987); *Brightly v. Wainwright*, 814 F.2d 612 (llth Cir. I987). These cases — sustaining more burdensome restrictions on prisoners' rights despite the imposition of a more exacting level of scrutiny than that required by this Court — confirm that the court below wholly misapplied *Turner* and *O'Lone*, and that this Court should grant certiorari to review the judgment below and resolve the conflict between the Second Circuit and the other courts of appeals.

---

[4] The *Reed* court vacated the district court's judgment upholding the regulation because the district judge had wholly failed to address an equal protection claim concerning an unexplained exemption for Indian inmates, had partly grounded his holding on a legally insufficient finding that the plaintiff's beliefs were insincere, and had based his holding not on the escape rationale, which the court of appeals strongly suggested it would have found persuasive, but on a dubious finding (unsupported by any evidence and apparently unargued by the defendants) that dreadlocks symbolized black superiority and thus posed a danger of racial conflict. 842 F.2d at 962-64. The court made quite clear, however, that it would uphold the regulation on a proper record. In addition to the language cited in the above parenthetical, the court noted that the other cases upholding similar regulations "rest on findings of fact that demonstrate the reasonableness" of prison hair length regulations, and remarked that "the ultimate merits of Reed's challenge . . . may well be slight." *Id.* at 963.

II. THE RELIANCE OF THE COURT BELOW UPON PRECLUSION AS AN ALTERNATIVE BASIS FOR ITS HOLDING IS UNSUPPORTABLE.

The court of appeals relied upon the ostensibly preclusive effect of *Lewis* and *Overton* as an alternative basis for its invalidation of the haircut requirement. 905 F.2d at 575-76, App. 6a-9a. This reliance is unsupportable in view of this Court's express rejection in *Turner* and *O'Lone* of the *Abdul Wali* strict scrutiny standard under which *Lewis* and *Overton* were decided. It is settled beyond dispute that an intervening change in the law, such as that brought about by a controlling decision of this Court, defeats issue preclusion. Restatement (Second) of Judgments ("Restatement") § 28(2)(b) and comment c; *see* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction* ("Wright, Miller & Cooper") § 4425 at 259-64 (1981).

This rule is derived from the leading case of *Commissioner of Internal Revenue v. Sunnen* 333 U.S. 591 *(1948),*in which this Court held

> [A] subsequent . . . change or development in the controlling legal principles may make [a prior] determination obsolete or erroneous... . [T]he principle of collateral estoppel . . . is designed to prevent repetitious lawsuits over matters which have . . . remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous . . . .
>
> * * *
>
> [C]ollateral estoppel must be used with its limitations carefully in mind so as to avoid injustice. It must be confined to situations where the . . . applicable legal rules remain unchanged. . . . [A] judicial declaration intervening between the two proceedings may so change the legal atmosphere as to render the rule of

> collateral estoppel inapplicable. . . . [T]he supervening decision cannot justly be ignored by blind reliance upon the rule of collateral estoppel.

333 U.S at 599-600 (citations omitted). *Accord, e g., Limbach v. Hooven & Allison Co.*, 466 U.S. 353, 362-63 (1984); *Montana v. United States*, 440 U.S. 147, 155 (1979); *State Farm Insurance Co. v. Duel*, 324 U.S. 154, 162 (1945).[5]

In seeking to avoid this settled principle, the court below relied upon one line of dictum in the New York Court of Appeals decision in *Lewis* to hold that that case should be given preclusive effect despite the intervening change in the law brought about by *Turner* and *O'Lone*. 905 F.2d at 576, App. 9a. The *Lewis* court, after setting forth the stringent "least intrusive means" test of *Abdul Wali* as the governing standard, 68 N.Y.2d at 924, 510 N.Y.S.2d at 74 (prison regulation valid only if it "furthers substantial governmental interests . . . and its encroachment on First Amendment freedoms is no greater than necessary," citing *Wali*), noted that the defendant had argued for application of a more deferential "exaggerated response" test akin to that later established in *Turner* and *O'Lone*, and then stated that the plaintiff would prevail "whichever test is adopted". 68 N.Y.2d at 924, 510 N.Y.S.2d at 74. However, issue preclusion only bars

---

[5] Of course, in determining the preclusive effect to be given to a prior state court judgment, a federal court is required under 28 U.S.C. § 1738 to look to state law. *Marrese v. American Academy of Orthopedic Surgeons*, 470 U.S. 373, 380-81, 384 (1985). However, New York has adopted the issue preclusion rules set forth in Restatement §§ 27-29, *see Koch v. Consolidated Edison Co.*, 62 N.Y.2d 548, 554-55 nn.2 & 4, 479 N.Y.S.2d 163, 166-67 nn.2 & 4 (1984), and the Restatement rule concerning the effect of an intervening change in the law on issue preclusion is in turn derived from the federal rule set forth in *Sunnen*, *see* Reporter's Note to Restatement § 28 at 286-87. *See generally Winters v. Lavine*, 574 F.2d 46, 55-60 & n.14 (2d Cir. 1978) (New York law of issue preclusion substantially similar to federal law). Thus, New York follows the federal rule that an intervening change in the law destroys the preclusive effect of a prior judgment. *See Hodes v. Axelrod*, 70 N.Y.2d 364, 373-74, 520 N.Y.S.2d 933, 938 (1987); *John P. v. Whalen*, 54 N.Y.2d 89, 94-95, 444 N.Y.S.2d 598, 601 (1981); *Dutchess Sanitation Service, Inc. v. Town of Plattekille*, 51 N.Y.2d 670, 673-74, 435 N.Y.S.2d 962, 963-64 (1980).

relitigation of a determination that was necessary to the court's judgment in the earlier action. Restatement § 27 and comment h; Wright, Miller & Cooper § 4421. Once the New York court had determined that application of the haircut requirement to Lewis did not satisfy the then-governing *Wali* test, the further statement that it would not meet even the more deferential exaggerated response test was unnecessary to its judgment, and thus not entitled to preclusive effect.

Moreover, the *Lewis* court's holding under either standard turned on its determination that "a sufficient showing was not made here of administrative burden." 68 N.Y.2d at 924, 510 N.Y.S.2d at 74. Of course, under *Turner* and *O'Lone* the burden of making this showing is no longer placed on prison officials. Therefore, even insofar as the *Lewis* court purported to analyze the haircut requirement under an alternative "exaggerated response" test as well as under the *Wali* test, it still apportioned the burden of proof in a manner no longer acceptable under current law. A shift in the burden of persuasion, like any other change in the governing legal standard, defeats issue preclusion. Restatement § 28(4), comment f and illustrations 10 and 11; Wright, Miller & Cooper § 4422 at 212-13 & n.7.

The court below also relied upon the *post-Turner/O'Lone* affirmance of *Overton* by the Appellate Division of the New York State Supreme Court in support of its preclusion holding. 905 F.2d at 576; App. 9a. The Appellate Division's decision in *Overton* was not preclusive, however, for two reasons. First, an appeal from this decision was dismissed by the New York Court of Appeals as moot, on the ground that Overton had been released from prison, 72 N.Y.2d 838, 530 N.Y.S.2d 551, and a determination that cannot be reviewed because of mootness is without preclusive effect. Restatement § 28(1), comment a and Reporter's Note at 284-85. Moreover, the Appellate Division relied entirely upon the earlier decision of the Court of Appeals in *Lewis*, in the mistaken belief that that case had been decided under the *Turner-O'Lone* analysis. *See Overton*, 133 A.D.2d at 745-46, 520 N.Y.S.2d at 34 (asserting that the *Lewis* court had applied the *Turner-O'Lone* standard). In fact, the Court of Appeals in

Lewis did not apply this standard and could not have done so, as *Lewis* was decided in November, 1986 and the *Turner-O'Lone* standard was not enunciated by this Court until June, 1987. As noted, the *Lewis* court actually analyzed the haircut requirement under the *Abdul Wali* "least restrictive alternative" test that was later rejected in *Turner* and *O'Lone*. "[A]n appellate court's mistaken affirmance of a finding that was never made does not give rise to issue preclusion." Wright, Miller & Cooper § 3324 at 304 (citing *Haize v. Hanover Insurance Co.*, 536 F.2d 576, 579 n.2 (3d Cir. 1976)).[6]

---

[6] It was improper to invoke preclusion in the present case for a variety of other reasons as well. First, the fundamental preclusion requirement of issue identity, Restatement § 27, was lacking, as the issue of the general validity of the haircut requirement is different from the issue of its validity as applied to a single plaintiff with particular facial features. (The *Lewis* court based its decision on the fact that Lewis had a receding hairline. App. 58a.) Moreover, the ostensibly preclusive cases were themselves inconsistent with other decisions upholding the haircut requirement against free exercise clause challenges brought by Rastafarian or American Indian inmates. *Solomon v. Coughlin*, 89 A.D.2d 1045, 456 N.Y.S.2d 125 (3d Dep't 1982); *Ellis v. Jackson*, No. 10446/85 (N.Y. Sup. Ct. Westchester Co. July 8, 1985) [App. 61a-62a]; *Chapman v. Jackson*, No. 11046/85 (N.Y. Sup. Ct. Westchester Co. Aug. 3, 1985) [App. 63a]. Non-mutual preclusion should not be applied when "[t]he determination relied on as preclusive was itself inconsistent with another determination of the same issue." Restatement § 29(4); *accord Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330 & n.14. Finally, under this Court's reasoning in *United States v. Mendoza*, 464 U.S. 154 (1984), offensive non-mutual preclusion should not be invoked against state defendants. *See Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558, 1579 (11th Cir. 1985).

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated New York, New York
August 16, 1990

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
120 Broadway
New York, New York 10271
(212) 341-2620

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General
and Counsel of Record

HOWARD L. ZWICKEL
Assistant Attorney General
In Charge, Litigation Bureau

DENNIS J. SAFFRAN
Assistant Attorney General

of Counsel

APPENDIX

UNITED STATES COURT OF APPEAL

FOR THE SECOND CIRCUIT

Nos. 501, 502 — August Term, 1989

(Argued December 13, 1989 Decided May 18 1990)

Docket Nos. 89-2265(L), -2267

THOMAS BENJAMIN, ERROL DUNKLEY, FRANK FORREST, BARRINGTON GRAY, NEWTON HANNON, and MARTIN SPENCE, on behalf of all others similarly situated,

Plaintiffs-Appellants, Cross-Appellees,

-against-

THOMAS A. COUGHLIN, Commissioner, New York State Department of Correctional Services; STEPHEN DALSHIEM, Superintendent, Ossining Correctional Facility; EUGENE S. LeFEVRE, Superintendent, Clinton Correctional Facility; HAROLD SMITH, Superintendent, Attica Correctional Facility,

Defendants-Appellees, Cross-Appellants.

Before: VAN GRAAFEILAND, PIERCE and MINER, *Circuit Judges.*

Appeal from judgment entered in United States District Court for the Southern District of New York (Stanton, *J.*) rejecting Rastafarian inmate plaintiffs' first and fourteenth-amendment claims to congregate prayer, use of religious headgear and special diet, and cross-appeal from judgment enjoining defendants from enforcing against plaintiff class a haircut requirement challenged on first amendment and collateral estoppel grounds.

Affirmed.

ROBERT SELCOV, New York, N.Y.
(Stephen M. Latimer, David C. Leven
Prisoners' Legal Services of New York,
Poughkeepsie, N.Y., of counsel),
for Plaintiffs-Appellants,
Cross-Appellees.

DENNIS J. SAFFRAN, Assistant
Attorney General, New York, N.Y.
(Robert Abrams, Attorney General
of the State of New York, New York
N.Y., of counsel),
for Defendants-Appellees,
Cross-Appellants.

MINER, *Circuit Judge:*

Plaintiffs, Rastafarian inmates in the custody of the New York State Department of Correctional Services ("DOCS"), appeal from a judgment entered in the United States District Court for the Southern District of New York (Stanton, *J.*) rejecting claims, brought pursuant to 42 U.S.C. § 1983 (1982), that various regulations and policies of DOCS violate their first amendment right to free exercise of their religion and their fourteenth amendment right to equal protection of the laws. *Benjamin v. Coughlin*, 708 F. Supp. 570 (S.D.N.Y. 1989). Specifically, the district court rejected plaintiffs' contentions that they were entitled to weekly congregate prayer, unrestricted wearing of religious headgear and a diet consistent with their religious beliefs.

Defendants, the Commissioner of DOCS and three correctional facility superintendents, appeal from so much of the judgment as enjoins the enforcement of a regulation requiring members of the plaintiff class to submit to a haircut upon admission to a facility under defendants' jurisdiction. The district court found that defendants were precluded from enforcing the regulation under the doctrine of collateral estoppel, and that the regulation violates the free exercise clause of the first amendment. Defendants contend that the regulation is reasonably related to valid penological interests and that litigation of the issue was improperly precluded by the district court.

For the following reasons, we affirm.

BACKGROUND

The Rastafarian religion[1] was founded in Jamaica. Adherents believe that the coronation of Haile Selassie, the deceased emperor of Ethiopia, constituted the fulfillment of a prophesy. Aside from the belief in the divinity of Haile Selassie, the religion is marked by a decentralized structure and the absence of a conventional religious hierarchy. The closest example of an authoritative figure is an "Elder," one who has studied the tenets of the religion.

A fundamental tenet of the religion is that a Rastafarian's hair is not to be combed or cut, resulting in ropelike strands known as "dreadlocks." Directive 4914 of the DOCS, however, requires all newly admitted males to submit to a haircut and photograph upon arrival at a DOCS facility. Male inmates are then permitted to regrow their hair to any length and are subject to rephotographing if their appearance changes drastically.

Plaintiffs also believe that, whenever they are in public places, their dreadlocks must be covered by loose-fitting knit headgear known as "crowns." Under current policy, crowns may be worn only in designated areas of DOCS facilities. Jewish and Muslim inmates, however, are permitted to wear their respective religious headgear throughout the prison facilities, subject to frisk searches.

Rastafarians engage in congregate religious observance—"Issembly"—which consists of chanting, beating of drums, readings, and religious conversation called "reasoning."[2] Plaintiffs have been denied the right to congregate for weekly religious observance. This restriction is based on defendants' interpretation of New York Correction Law § 610 (McKinney 1987) as prohibiting religious congregation unless an outside spiritual sponsor is available to supervise the service. Although Muslim and Buddhist inmates are permitted to use inmate religious leaders, under the supervision of an outside sponsor who is not present at the meeting, plaintiffs have not been permitted to use inmate leaders because no outside sponsor has come forward.

Many Rastafarians observe a strict vegetarian diet called "Ital," which includes prohibitions on the consumption of meat and caffeine and restricts the diet to natural foodstuffs. Dietary habits vary among Rastafarians, but consumption of pork seems to be prohibited generally. Under DOCS policy, alternative portions are offered to all inmates whenever pork is served, and special kosher meals are provided for inmates at some facilities. Muslim and Buddhist inmates are provided special meals during certain holidays.

In August 1986, the district court granted a preliminary injunction enjoining the enforcement of the initial haircut requirement as it applied to the plaintiffs. *Benjamin v. Coughlin*, 643 F. Supp. 351 (S.D.N.Y. 1986). The court based this injunction on the preclusive effect of New York state court decisions in *Lewis v. Commissioner of the Dep't of Correctional Servs.*, No. 85-11167, slip op. (Sup. Ct. Aug. 1, 1985), *aff'd sub nom. People v. Lewis*, 115 A.D.2d 597, 496 N.Y.S.2d 258 (2d Dep't 1985), *aff'd*, 68 N.Y.2d 923, 502 N.E.2d 988, 510 N.Y.S.2d 73 (1986) (mem.), and *Overton v. Department of Correctional Servs.*, 131 Misc. 2d 295, 499 N.Y.S.2d 860 (Sup. Ct. 1986), *aff'd*, 133 A.D.2d 744, 520 N.Y.S.2d 32 (2d Dep't 1987) (mem.), *appeal dismissed*, 72 N.Y.2d 838, 526 N.E.2d 42, 530 N.Y.S.2d 551 (1988). *Benjamin v. Coughlin*, 643 F. Supp. at 357.

Defendants moved to vacate the injunction in June of 1987 on the ground that the Supreme Court's decisions in *Turner v. Safley*, 482 U.S. 78 (1987), and *O'Lone v. Estate of Shabazz*, 482 U.S. 342 (1987), altered the standard of review for prisoners' rights claims. The district court reserved decision and heard testimony without a jury on all of plaintiffs' claims. In its post-trial decision in 1989, the district court reaffirmed the application of nonmutual offensive collateral estoppel but also found that Directive 4914 did not pass constitutional muster under *Turner* and *Shabazz*. *Benjamin*, 708 F. Supp. at 573. The court enjoined enforcement of the haircut regulation as it applied to the plaintiff class but rejected plaintiffs' challenges to the denial of the right to congregate, to wear crowns, and to be provided with a special diet. *Id.* at 573-76.

DISCUSSION

I. Standards to be Applied

Balanced against the constitutional protections afforded prison inmates, including the right to free exercise of religion, are the interests of prison officials charged with complex duties arising from administration of the penal system. *Pell v. Procunier*, 417 U.S. 817, 822 (1974). Recognizing that federal courts are ill-equipped to deal with the complexities of prison administration,

the Supreme Court has accorded great deference to determinations of prison officials and fashioned "a lesser standard of scrutiny . . . in determining the constitutionality of the prison rules." *Turner*, 482 U.S. at 81; *see also Shabazz*, 482 U.S. at 349.

The governing standard is one of reasonableness, taking into account whether the particular regulation affecting some constitutional right asserted by a prisoner is "reasonably related to legitimate penological interests." *Turner*, 482 U.S. at 89; *Shabazz*, 482 U.S. at 349. The *Turner* Court determined that the factors to be considered are: 1) whether there is a rational relationship between the regulation and the legitimate government interests asserted; 2) whether the inmates have alternative means to exercise the right; 3) the impact that accommodation of the right will have on the prison system; and 4) whether ready alternatives exist which accommodate the right and satisfy the governmental interest. *Turner*, 482 U.S. at 89-90; *Fromer v. Scully*, 874 F.2d 69, 72 (2d Cir. 1989).

In addition to their first amendment claims, plaintiffs here assert that they have been denied equal protection by reason of treatment different from that afforded to other religious groups. While the *Turner/Shabazz* standard was established in the context of first amendment issues, it is also relevant to the assessment of equal protection claims in the prison setting. As to such claims, the reasonableness of the prison rules and policies must be examined to determine whether distinctions made between religious groups in prison are reasonably related to legitimate penological interests. *See Williams v. Lane*, 851 F.2d 867, 877 (7th Cir. 1988), cert. denied, 109 S. Ct. 879 (1989). We must determine whether "the . . . groups are so similar that discretion has been abused." *Jones v. North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119, 136 (1977).

II. The Haircut Regulation

A. Issue Preclusion

Departmental Directive 4914 requires that upon entry into a correctional institution all male inmates receive a haircut[3] for

purposes of an identification photograph. Defendants maintain that the haircut highlights an inmate's facial and cranial features in the photograph, and thus facilitates recapture in the event of escape. After the initial haircut, an inmate is permitted to regrow his hair to any length but is subject to being rephotographed if his appearance changes drastically. The challenge to Directive 4914 is founded on the contention that it violates the inmates' free exercise clause rights. "Many Rastafarians take the 'vow of the Nazarite' never to cut their hair," believing that the wearing of dreadlocks is sacred. *Benjamin*, 708 F. Supp. at 572.

The district court enjoined enforcement of the Directive on two grounds. Applying the doctrine of offensive collateral estoppel, the court determined that the defendants were precluded from relitigating the validity of the Directive because the issue previously had been decided against them by the New York Court of Appeals in *Lewis* and *Overton*. *Id.* at 573. The court further determined that, even if preclusion was improper, Directive 4914 failed to pass constitutional muster under *Turner*. *Id.* We agree with both determinations.

On appeal, defendants challenge the application of the collateral estoppel doctrine on three grounds. They assert that there is an absence of identicality of issues between the state cases and the case here; that offensive issue preclusion should not apply against the government; and that a subsequent change in law renders preclusion improper.

In determining the preclusive effect given a state court judgment under 28 U.S.C. § 1738 (1982), a federal court must "give that judgment the same effect that it would have in the courts of the state under state law." *Cullen v. Margiotta*, 811 F.2d 698, 732 (2d Cir.), *cert. denied*, 483 U.S. 1021 (1987); *see Wilder v. Thomas*, 854 F.2d 605, 616 (2d Cir. 1988), *cert. denied*, 109 S. Ct. 1314 (1989). Defendants argue that the prior proceedings involved only the validity of Directive 4914 as it applied to the individual inmates in those cases and not its constitutionality as applied to any other parties, including members of the plaintiff class. They note that the state courts found that DOCS

objectives could be achieved by merely tying back the hair of those individual inmates during their initial photographs. *See Lewis*, 68 N.Y.2d at 925, 502 N.E.2d at 989, 510 N.Y.S.2d at 74; *Overton*, 133 A.D.2d at 746, 520 N.Y.S.2d at 34.

Application of the doctrine of collateral estoppel requires a finding of "the identicality of an issue necessarily decided in the prior action" and "a full and fair opportunity to contest the issue in the prior action." *Halyalkar v. Board of Regents*, 72 N.Y.2d 261, 266, 527 N.E.2d 1222, 1224, 532 N.Y.S.2d 85, 87 (1988) (citation omitted). We are confronted here with the constitutional validity of Directive 4914 as it applies to the plaintiffs, a mixed question of law and fact necessarily confronted by the state courts in assessing the legitimacy of the security concerns raised by the DOCS. *See Lewis*, 68 N.Y.2d at 924-25, 502 N.E.2d at 989, 510 N.Y.S.2d at 74; *Overton*, 133 A.D.2d at 745-46, 520 N.Y.S.2d at 34.

In the district court, defendants presented much of the same evidence that they presented in the state courts, including testimony of Deputy Commissioner Coombe, various sets of photographs, and even photographs of Messrs. Lewis and Overton. The only set of photographs presented in the *Overton* case, however, was that of Mr. Overton. We find that, between the state and federal proceedings, there is a "substantial overlap" of evidence and arguments. *Restatement (Second) of Judgments* § 27 comment c (1982); *see Koch v. Consolidated Edison Co. of New York*, 62 N.Y.2d 548, 554 n.2 & 555 n.4, 468 N.E.2d 1, 4 nn.2 & 4, 479 N.Y.S.2d 163, 166 nn.2 & 4 (1984) (adopting the issue preclusion factors outlined in the Restatement), *cert. denied*, 469 U.S. 1210 (1985).

The action at bar was commenced in 1979, several years before the state court decisions in *Lewis* and *Overton*. Therefore, defendants had a strong incentive, as well as a fair opportunity, to contest the haircut issue fully in the New York State courts, recognizing that any determination might have a preclusive effect in the pending federal action. *See Winters v. Lavine*, 574 F.2d 46, 59 n.14 (2d Cir. 1978).

Defendants urge that nonmutual offensive collateral estoppel cannot be invoked against the government. *See United States v. Mendoza*, 464 U.S. 154 (1984). The *Mendoza* Court declined to apply offensive issue preclusion against the federal government, finding that certain policy considerations weighed against preclusion in that case. *Id.* at 160-61. Significantly, the Solicitor General had decided not to appeal a previous adverse judgment, *id.* at 159, 161, unlike the situation here, where the defendants appealed two prior judgments resolving the same issues to the state's highest court.

The major policy interests outlined in *Mendoza* were avoidance of premature estoppel and assurance of an opportunity for the government to consider the administrative concerns that weigh against initiation of the appellate process. *Id.* Here, the issue percolated through the state courts and was decided by the New York Court of Appeals during the pendency of the case at bar. Decisions by several state courts assured defendants that preclusion was not premature, that proper review of the issues occurred prior to application of preclusion principles, and that the DOCS had the opportunity to consider appeal of the state court decisions in light of the pending federal action.

Lastly, defendants contend that a change in the governing constitutional standard since *Lewis* renders preclusion improper. We note that *Lewis* considered two levels of scrutiny and found that even under a standard more burdensome to the plaintiffs than the *Turner/Shabazz* reasonableness standard, plaintiffs would prevail. *Lewis*, 68 N.Y.2d at 924-25, 502 N.E.2d at 989, 510 N.Y.S.2d at 74. The decision in *Overton*, decided after pronouncement of the new standard, followed the mandate of the Supreme Court. *Overton*, 133 A.D.2d at 745, 520 N.Y.S.2d at 34.

In light of the foregoing, we find the district court properly gave preclusive effect to the prior state court proceedings.

B. Constitutionality of Directive 4914

Defendants argue that the initial haircut is necessary for purposes of identification in the event of escape. Accepting the

existence of reasonable security concerns, we find there is an alternative that can accommodate both parties. *See Turner*, 482 U.S. at 91. After reviewing the voluminous record and hearing testimony from both Rastafarian inmates and prison officials, the district court determined that pulling plaintiffs' hair back met the purported security needs. *Benjamin*, 708 F. Supp. at 573. Great deference must be accorded the DOCS' position that this solution is inadequate. *Fromer*, 874 F.2d at 73. Defendants, however, have failed to establish that the accommodation here has more than a de minimis effect on valid penological interests. *Turner*, 482 U.S. at 91. In *Fromer*, it appeared that there was no alternative to shaving the appellant's beard to reveal his facial features properly. *Fromer*, 874 F.2d at 76. Here, however, tying plaintiffs' hair in pony tails adequately accommodates the interests of prison authorities in revealing an inmate's cranial and facial features.

Plaintiffs are permitted to regrow their hair to any length after the initial haircut. While defendants assert that this is an accommodation, this "misses the point of the violence done [to an inmate's] religious beliefs when his hair is cut." *Benjamin*, 708 F. Supp. at 573. Although length of hair makes identification difficult upon escape, a photograph of a Rastafarian when his hair is short would create the same identification problems, because he certainly will regrow his hair. The fact that inmates are rephotographed if their appearance changes drastically indicates that defendants believe they will be able to identify the plaintiffs from the new photographs. It is unclear how this is any different from identifying plaintiffs as they appear upon arrival. Accordingly, we find that there exists an alternative means of accommodating plaintiffs' religious rights without undermining the legitimate penological interests identified by the defendants.

III. Weekly Religious Congregation

Plaintiffs maintain they have been denied the right to congregate for weekly religious observance in violation of the free exercise clause of the first amendment, and that the prohibition

is inconsistent with the permissible congregation of other religious groups in DOCS facilities. They further assert that section 610 of the New York Correction Law does not require outside clergy to conduct services but merely allows religious groups the right to have services conducted by outside clergy if available. Section 610 provides, in relevant part, that "inmates . . . shall be allowed such religious services and spiritual advice and spiritual ministration from some recognized clergyman of the denomination or church which said inmates may respectively prefer or to which they have belonged prior to their being confined . . . ." N.Y. Correct. Law § 610.

The DOCS has interpreted section 610 to mean that inmate religious groups are permitted to congregate for religious observance only under the supervision of a non-inmate spiritual leader known as a "free-world sponsor." It has adopted Directive #4760, entitled "Inmate Group Activities and Organizations," which is applicable to religious groups. Paragraph III (C)(3) of the Directive provides that a "[b]ona fide 'outside sponsor' is mandatory for each inmate organization." A bona fide sponsor is defined as:

> any individual or group duly registered and approved with the Volunteer Services Program that will visit the facility regularly to provide assistance to the inmate organization. A minimum of one visit per quarter is desired. In addition, ongoing communication with the facility Volunteer Services Office should be carried on. (All volunteer participants from the community must meet the registration and approval requirements of Directive #4750, "Volunteer Services Programs.")

While it may be that the free-world sponsor requirement is inconsistent with the statutory language, determination of that issue is reserved for state courts. *Cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). We must resolve whether the present interpretation of section 610 by DOCS is consistent with constitutional standards.

The sponsor requirement is said to be intended to ensure that the meeting is convened for religious purposes and not to hold kangaroo courts, foster extortion, or provide a venue for the dissemination of conspiratorial information. As well, the use of sponsors is thought to minimize conflicts among inmates as to the nature and content of the service. Other circuits have given their imprimatur to the requirement of free-world sponsors based upon similar security concerns. *See, e.g., Johnson-Bey v. Lane*, 863 F.2d 1308, 1310-11 (7th Cir. 1988); *Cooper v. Tard*, 855 F.2d 125, 129-30 (3d Cir. 1988); *Hadi v. Horn*, 830 F.2d 779, 784-86 (7th Cir. 1987); *Tisdale v. Dobbs*, 807 F.2d 734, 736, 740 (8th Cir. 1986). We also are satisfied that the sponsor requirement meets the rational relationship and impact of accommodation prongs of the *Turner* standard.

Applying the second *Turner* prong, alternative means, it appears that plaintiffs are not prohiited from "reasoning," a form of religious discussion, as an alternative means of prayer. *Cooper*, 855 F.2d at 129-30. In fact, part of the Rastafarian service consists of reasoning. As long as plaintiffs are permitted to engage in such discussion, they have other means of exercising their right of congregate prayer.

As to the fourth prong, availability of ready alternatives, defendants have suggested that they might accept an outside "Elder" as a free-world sponsor. An Elder is not a clergyman but retains authority as a result of his education and familiarity with the Rastafarian religion. Any objection to the authority of an Elder, simply because the Rastafarian religion lacks conventional clergyman, would be unwarranted. In view of the legitimate security reasons supporting the free-world sponsor requirement, the failure of an outside Elder to come forward cannot justify the finding of a first amendment violation. The inmates' proposal that a non-religious supervisor be used would not resolve the doctrinal disputes that are the subject of security concerns. *See Hadi*, 830 F.2d at 786-87.

Similarly, we are not persuaded that the free-world sponsor requirement violates plaintiffs' right to equal protection of the laws. The plaintiffs argue that defendants have permitted the

use of inmate Imams to conduct Muslim services and therefore they should be accorded the same privilege. This contention, however, fails to recognize the reason for the free-world sponsor requirement. It is not the presence or absence of the sponsor at the service that is the concern but rather the availability of an outside ministerial authority in religious matters.

The requirement of an outside resource is compelled by the defendants' concern that the authenticity of the service will be compromised or that particular religious issues may arise which cannot be resolved by DOCS staff. Thus, the defendants have expressed a rational basis for requiring outside sponsors even if the sponsors are not required to attend every service. The DOCS has an outside resource to contact with respect to Muslim and Buddhist services, and it indicated that it would "allow Rastafarians to hold congregate services when and if . . . an outside sponsor comes forth." *Benjamin*, 708 F. Supp. at 576.

The apparent unavailability of a Rastafarian Elder or similar religious authority willing to serve as an outside sponsor is not the fault of the defendants. Had the plaintiffs proved that the DOCS arbitrarily rejected available sponsors, then a cognizable claim might exist. However, the district court found that the defendants have made a good faith effort "to locate and obtain the services of a sponsor." *Id.* at 576-77. We agree with the district court that the free-world sponsor requirement does not violate equal protection because it has a legitimate basis and is imposed on all religious groups.

IV. The Wearing of Crowns

We next address the constitutionality of the DOCS regulations which restrict the wearing of crowns to designated areas. From the perspective of first amendment analysis, legitimate security reasons are raised in support of present policy. Preventing the smuggling of contraband, such as weapons and drugs, comports with the type of penological interests contemplated under the *Turner/Shabazz* standard. *See Turner*, 482 U.S at 89. We have examined each prong of the first amendment analysis and find plaintiffs' claim to be without merit. *See, e.g.*,

Standing Deer v. Carlson, 831 F.2d 1525, 1528 (9th Cir. 1987); *Rogers v. Scurr*, 676 F.2d 1211, 1215 (8th Cir. 1982).

Jewish inmates are permitted to wear yarmulkes throughout DOCS facilities, and Muslim prisoners may wear kufis. The right of Rastafarians to wear crowns, however, is limited, and in some facilities crowns are wholly prohibited. Plaintiffs contend that the unlimited right granted Jewish and Muslim inmates, as opposed to Rastafarian prisoners, to wear religious headgear establishes an equal protection violation. We disagree.

The district court found that crowns are large and loosefitting, providing a readily available means for "concealing and transporting weapons, controlled substances or other contraband, thus posing a threat to prison security." *Benjamin*, 708 F. Supp. at 574. While security problems may exist with respect to yarmulkes and kufis, defendants maintain that a heightened security concern is posed by crowns, because of the size of the headgear and the ease with which contraband can be secreted. Here, legitimate security interests have been raised by the prison authorities, who must be accorded great deference in these matters. *Turner*, 482 U.S. at 84-85.

The fact that the defendants are willing to conduct spot searches of Jewish and Muslim inmates does not mean that they are required to do the same for all prisoners claiming a right to wear headgear. The prison officials justifiably expressed the belief that crowns presented a greater danger than yarmulkes and kufis. The greater security concern associated with the wearing of crowns, including the enhanced potential for concealing contraband and the obvious increase in guard/inmate contact that would result from searches of crowns, provides a rational basis for treating the plaintiffs differently from the other religious groups with respect to headgear. *See North Carolina Prisoners' Union*, 433 U.S. at 136. The district court found that "yarmulkes and kufis are smaller and fit closely to the head, while the crown is of a size and shapelessness which would facilitate uses which are legitimately forbidden." *Benjamin*, 708 F. Supp. at 574. Accordingly, we find no merit to plaintiffs' contention that the

restriction imposed on the wearing of crowns violates their equal protection rights.

V. Ital Diet

Rastafarians observe a diet called Ital, which "symbolizes a belief in life and an avoidance of symbols of death." *Benjamin*, 708 F. Supp. at 575. The exact nature of the Ital diet varies among individuals and Rastafarian sects. *Id.* The district court denied plaintiffs' dietary claim, determining that the varied individual practices "would impose undue financial and administrative burdens on defendants." *Id.* Although it appears that plaintiffs originally sought a strict Ital diet, they now "ask that their dietary needs be accommodated in a way similar to that defendants have already adopted for other religious groups." On appeal, plaintiffs advance an equal protection challenge, asserting that similar dietary requests have been granted to other religious groups.

Prisoners have a right "to receive diets consistent with their religious scruples." *Kahane v. Carlson*, 527 F.2d 492, 495 (2d Cir. 1975). Courts, however, are reluctant to grant dietary requests where the cost is prohibitive, *see Martinelli v. Dugger*, 817 F.2d 1499, 1507 & n.29 (11th Cir. 1987), *cert. denied*, 484 U.S. 1012 (1988); *Kahey v. Jones*, 836 F.2d 948, 951 (5th Cir. 1988), or the accommodation is administratively unfeasible, *see Kahey*, 836 F.2d at 951; *Kahane*, 527 F.2d at 495.

The dietary programs presently in effect are well-defined. Muslim inmates are provided the alternatives to pork available to all inmates, and receive a special dietary accommodation during the month-long Muslim holiday of Ramadan. During Ramadan, Muslims are permitted to prepare and eat food in their cells, but the foodstuffs they receive are those served to the entire prison population. In order to accommodate the dietary habits of Orthodox Jewish inmates, a kosher dietary plan is provided at the Green Haven facility; and neutral diets, consisting mainly of canned goods, eggs, and occasionally fresh vegetables, are provided at other facilities as alternatives to the kosher dietary plan.

Plaintiffs now seek a "vegetarian diet with foodstuffs that their faith permits them to eat." They also contend that a kosher diet would "substantially meet their religious need." Notwithstanding this attempted clarification, the varied nature of the Ital diet raises questions as to the foodstuffs that will satisfy their request. This problem exists because Rastafarians will not consume canned goods, and fresh fruits and vegetables have a limited availability and are not cost-effective. *Benjamin*, 708 F. Supp. at 575.

We remain uncertain as to the exact nature of the dietary request, which has varied during the course of this litigation. Based on the present state of the record, we find that the dietary claim must be rejected because plaintiffs have failed to clearly define the claim or to make the evidentiary showing required to establish any constitutional dietary claim.

CONCLUSION

For the foregoing reasons, we affirm. No costs are awarded to either side.

NOTES

1. Defendants do not raise the issue whether Rastafarianism is a religion protected by the first amendment. That issue has been resolved against them in state court. *Overton v. Coughlin*, 133 A.D.2d 744, 745-46, 520 N.Y.S.2d 32, 34 (2d Dep't 1987).

2. The Rastafarian service is also said to involve the smoking of marijuana. Plaintiffs, however, do not assert that they should be permitted to smoke marijuana during their services.

3. Male inmates also receive an initial shave; however, that facet of Directive 4914 was found to be constitutional in *Fromer*, 874 F.2d at 76.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

THOMAS BENJAMIN, ERROL DUNKLEY, FRANK FORREST, BARRINGTON GRAY, NEWTON HANNON, and MARTIN SPENCE, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

— against —

THOMAS A. COUGHLIN, Commissioner, New York State Department of Correctional Services; STEPHEN DALSHIEM, Superintendent,: Ossining Correctional Facility; EUGENE S. LEFEVRE, Superintendent, Clinton Correctional Facility; HAROLD SMITH, Superintendent, Attica Correctional Facility,

Defendants.

---------- X

OPINION AND ORDER

79 Civ. 0232 (LLS)

Plaintiffs are Rastafarian inmates in the custody of the New York State Department of Correctional Services ("DOCS").

Rastafari is a religion[1] with roots in Jamaican culture. It has no hierarchy of religious authority, although Rastafarians recognize some who have studied the religion extensively as "elders," and no single religious text setting out the central tenets of Rastafarian belief, although Rastafarians consider certain Bible passages sacred. There are several Rastafarian sects, with differing beliefs and practices.

---

[1] Defendants do not contest the fact that Rastafarianism is a religion. Deft's Post-trial Reply Memorandum, p. 1; Stenographer's Minutes of trial ("SM") 17-19.

The most widely accepted Rastafarian principles include beliefs in the divinity of Ethiopian Emperor Haile Selassie and that the hair and beard should never be cut. Many Rastafarians wear their hair uncut, uncombed, and called "dreadlocks." Many believe that the dreadlocks should be covered at all times, except when praying, and wear a religious "crown" — a loose knit or crocheted headcovering — to protect their dreadlocks. Rastafarians engage in dialogues about the meaning of scripture, known as "reasoning," and conduct weekly group services that last from a few hours to several days. They also hold religious celebrations on Haile Selassie's birthday and on the anniversary of his coronation. The green, red, and gold colors of the Ethiopian flag and the lion, which symbolizes Haile Selassie, are sacred symbols. Many Rastafarians follow what is known as an "Ital" diet, abstaining from meat, liquor, and caffeine, and eating only natural foods, although there are variations in these practices.

Plaintiffs claim that four regulations of the defendants, who administer prison facilities in New York State, violate their rights to free exercise of religion and equal protection of the laws. First, defendants cut the hair of all incoming prisoners for the purpose of taking identification pictures. Second, defendants restrict the wearing of the religious "crown." Third, defendants do not provide Rastafarian inmates with an Ital diet. Fourth, defendants do not allow Rastafarian inmates to hold weekly congregate religious services or holiday celebrations. Defendants claim that each of their actions is motivated by a legitimate penological objective.

Procedural History

The action was commenced on January 15, 1979. It was dormant from April 1980 to March 1985, while settlement was discussed unsuccessfully. In May 1986, the parties stipulated to certification of a plaintiff class consisting of all "persons who are or who shall be committed to the care and custody of the New York State Department of Correctional Services and confined in facilities under its jurisdiction and control, who sincerely

profess to observe and adhere to the tenets of Rastafarianism." On August 29, 1986 the court granted plaintiffs' motion for a preliminary injunction prohibiting DOCS from cutting the hair of class members. *Benjamin v. Coughlin*, 643 F. Supp. 351 (S.D.N.Y. 1986). On June 30, 1987, defendants filed a motion to vacate the preliminary injunction. The motion has been consolidated with the trial of the merits of plaintiffs' claims.

A bench trial was held on August 31, September 1, 2 and 3, 1987. The court heard testimony from eight inmate class members (Jah Bunny, Ernest Desire, David Daley, Edward Jamison, Ernest Nurse, Wayne Overton, Alfredo Lewis and Marlon Clarke), plaintiffs' expert nutritionist Bob LeRoy, defendants Thomas Coughlin (Superintendent of DOCS) and Philip Coombe (Deputy Commissioner of DOCS facility operations), The Reverend Earl Moore (DOCS Assistant Commissioner for Ministerial and Family Services), Elizabeth VandeWal (DOCS Assistant Director for Nutritional Services) and Louis Passara (DOCS Director of Correctional Nutritional Services).

DISCUSSION

The First Amendment to the Constitution states in part "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." Every prison inmate "retains those First Amendment rights that are not inconsistent with his status as a prisoner or with the legitimate penological objectives of the corrections system." *Pell v. Procunier*, 417 U.S. 817, 822 (1974); *see also Bell v. Wolfish*, 441 U.S. 520, 545 (1979); *Price v. Johnston*, 334 U.S. 266, 285 (1948). Recognizing that "courts are ill equipped to deal with the increasingly urgent problems of prison administration and reform," *Procunier v. Martinez*, 416 U.S. 396, 405 (1974) the Supreme Court has tempered its scrutiny of challenged prison regulations. *See e.g., Turner v. Safley*, 107 S. Ct. 2254 (1987) ; *O'Lone v. Estate of Shabazz*, 107 S. Ct. 2400 (1987). "Subjecting the day-to-day judgments of prison officials to an inflexible strict scrutiny analysis would seriously hamper their ability to anticipate security problems and to adopt innovative solutions to the intractable problems of prison administration." *Turner*, 107 S. Ct. at 2262.

In *Turner*, the Supreme Court identified four factors relevant to whether a challenged prison regulation is valid as reasonably related to legitimate penological interests. The first is whether there is a valid, rational connection between the regulation and the government interest put forward to justify it, which must be legitimate and neutral as to content. The second is whether alternative means of exercising the right remain open to inmates. The third consideration is the impact that accommodation of the claimed right would have on guards, other prisoners, and the allocation of prison resources. Finally, the "absence of ready alternatives is evidence of the reasonableness of a prison regulation," while the existence of easy alternatives may show that a regulation is not reasonable, but is an exaggerated response to prison concerns. *Turner*, 107 S. Ct. at 2262.

The Challenged Regulations

1. The Initial Haircut

Many Rastafarians take the "vow of the Nazarite" never to cut their hair or beard. Inmate witnesses testified that the wearing of dreadlocks is a "consecration" and a "covenant" with God. The source of the belief is both Biblical (identified by inmate witnesses as Leviticus 6 (SM 51), Numbers 6 (SM 307)) and symbolic of Haile Selassie, whose Nyabinghi warriors wore their hair in dreadlocks. The matted look of the hair is symbolic of a lion, and therefore of Haile Selassie, who is revered by Rastafarians as "the lion of Judah." The vow is of central importance to most Rastafarians. Ernest Nurse testified that the wearing of dreadlocks is "very holy" (SM 278).

Not all Rastafarians take the vow of the Nazarite. Three groups that are located in Jamaica, the "beard men," the "clean-shaven men" and the "Combsone tribe" do not wear dreadlocks. All of the prisoners who testified wear their hair in dreadlocks.

Departmental Directive No. 4914 requires that all male inmates submit to a haircut and shave for the taking of an initial identification photograph. Defendants argue that an initial clean-shaven, short-haired photograph is necessary for security

reasons. Deputy Commissioner Philip Coombe testified that a clean-shaven,[2] short-haired photograph is necessary to show the inmate's facial and cranial structure, which are important identifying features in case of an escape, because a fugitive could radically alter his appearance by cutting his hair. He testified that a picture with the inmate's dreadlocks pulled back is not adequate for identification purposes, and that DOCS has experienced security problems with other inmates who feel that the Rastafarians are being given special treatment.

The haircut issue has already been determined adversely to defendants in two state court cases, *Lewis v. Commissioner of the Department of Correctional Services*, No. 85-11167, slip op., (Sup. Ct. August 1, 1985), *aff'd sub nom., People v. Lewis*, 115 A.D.2d 597 (App. Div. 1985), *aff'd*, 68 N.Y.2d 923 (1986) and *Overton v. Dep't of Correctional Services*, 131 Misc.2d 295 (Sup. Ct. 1986), *aff'd*, 133 A.D.2d 744 (App. Div. 1987), *appeals dismissed*, 72 N.Y.2d 838 (1988). This court determined in August 1986 that defendants are precluded from relitigating the issue by the doctrine of collateral estoppel. *Benjamin*, 643 F. Supp. at 357. Defendants have failed to convince the court that that determination should be changed.

Defendants argue that non-mutual offensive collateral estoppel should not be applied against a state government. *See United States v. Mendoza*, 464 U.S. 154 (1984); *Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558 (11th Cir. 1985). In *Mendoza*, the court held that such estoppel should not apply against the federal government because of the nature and number of cases that the government litigates, and the fact that policy considerations may determine whether the government will appeal an adverse decision, unlike a private litigant. In *Hercules Carriers*, the court applied the rationale of *Mendoza* to state governments. The court relied on the fact that plaintiffs were seeking to preclude a state agency from relitigating an issue that had been previously determined in an administrative proceeding brought by a separate state regulatory agency. *Id.* at 1580.

---

[2] Plaintiffs do not challenge the requirement of an initial facial shave for identification purposes. Ptfs' Post Trial Mem., pg. 10.

The decision to apply offensive collateral estoppel must be made with discretion. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979). Here, the same state agency, DOCS, litigated and lost the issue in the state courts. The agency had a full and fair opportunity to litigate, and the identical issue was actually litigated and actually decided. The agency was aware that this action was pending at the time the state actions were decided, and so had a strong incentive to appeal the adverse decisions. Therefore, it is not unfair to prevent defendants from relitigating the issue in this case. *See Benjamin*, 643 F. Supp. at 356-57.

Even if DOCS were not precluded from relitigating the issue, Departmental Directive No. 4914 does not withstand scrutiny under the analysis set forth in *Turner*. Applying that analysis, one must grant there is a rational connection between the haircut requirement and the security objective put forth by defendants to justify it. Equally apparent is that alternative means of exercising the right do not remain open to plaintiffs. (Defendants' argument that an inmate may re-grow his hair to any length, after the reception haircut, misses the point of the violence done to his religious beliefs when his hair is cut.)

Defendants argue that the accommodation impact is great, because Rastafarian inmates must be segregated at reception, and processed either first or last, and that other inmates resent their being given special treatment. However, the accommodation impact is no greater than the practice prior to entry of the preliminary injunction, when Rastafarian inmates who refused to submit to a haircut were segregated and placed in involuntary protective custody, or had their hair cut by force.

The decisive factor in the analysis of the haircut issue is the availability of an obvious, easy alternative. The photographs that were submitted to the court showing the inmates' hair pulled back in a rubber band or a hairnet, demonstrate that such photos are adequate for security purposes. They show clearly the facial structure and features, and I find Mr. Coombe's testimony to the contrary unpersuasive. The availability of this easy and practical alternative demonstrates that the regulation is an exaggerated response to the perceived escape threat. That conclusion

accords with those repeatedly reached by the New York State courts, when the issue was presented to them, that "the asserted objective of the regulation in issue could be fully achieved simply by pulling his hair back when the initial identification photographs are taken", *Lewis*, 68 N.Y.2d at 925, and that "Directive No. 4914 constitutes an impermissible infringement of the plaintiff's constitutional right to fully exercise his religion." *Overton*, 133 A.D.2d at 745.

Plaintiffs would prevail on this issue even in the absence of the preclusive effect given to the state opinions, and plaintiffs are entitled to a permanent injunction on this issue.

2. The Religious Crown

The crown is worn as a Rastafarian tradition, to keep impurities from the dreadlocks, to shield them from the eyes of non-Rastafarians, and to keep the curious from touching them. Not all Rastafarians wear crowns, and those who do vary in the degree they observe the practice. Most crowns are large, loosely knit or crocheted circular wool caps, many in the green, red, and gold of the Ethiopian flag. However, Rastafarians wear hats of other descriptions to cover their dreadlocks.

Defendants contend that the crown is a security risk. The large, loose crown may be used for hiding contraband. Searching the crown necessitates increased contact between guards and inmates. The increase in close personal contacts in turn increases the threat of confrontations between guards and inmates, with its security risks.

Prohibitions on wearing the crown are not uniform throughout DOCS facilities. For instance, David Daley testified that at Green Haven, a maximum security facility, he is allowed to wear his crown everywhere but in the mess hall and the visiting room, while Edward Jamison testified that he was not allowed to wear his crown anywhere at Wyoming, a medium security facility, or Lincoln, a minimum security facility.

Application of the *Turner* four-part test demonstrates that defendants' regulations governing the wearing of the religious

crown do not impermissibly infringe on plaintiffs' First Amendment rights. There is a valid, rational connection between the prohibition on crowns in certain areas and the security interests put forward to justify it. The crown is a large, loose-fitting cap that may fairly readily be used for concealing and transporting weapons, controlled substances or other contraband, thus posing a threat to prison security and the safety of other inmates. Plaintiffs argue that the regulation is not neutral because Jewish and Muslim inmates are allowed to wear yarmulkes and kufis throughout the prisons. However, yarmulkes and kufis are smaller and fit closely to the head, while the crown is of a size and shapelessness which would facilitate uses which are legitimately forbidden.

Alternative means of exercising the right are available to inmates. They are allowed to wear the crown in their cells and at other times and in other areas that the prison administration determines do not pose a security threat. The fact that regulations on the wearing of crowns differ among institutions reflects responses to the different security concerns of each individual institution, illustrating that this is an inappropriate area for the court to substitute its judgment for those of the prison administrators.

The accommodation impact on guards and other prisoners would be substantial. The increased number of searches that would be required if inmates were allowed to wear their crowns at all times would threaten increased confrontations between guards and inmates, perhaps requiring a reallocation of prison resources.

There appears no easy alternative to the restriction. This may simply reflect the fact that already the crown is allowed in many areas, indicating that the most workable adjustments are in place.

In *Standing Deer v. Carlson*, 831 F.2d 1525 (9th Cir. 1987), the court applied the *Turner* four-part test and upheld a prison regulation that forbids the wearing of religious headbands by Native Americans in the mess hall. The court held that "it is

clear that the dress regulation involved in this case is logically connected to the concerns of cleanliness, security, and safety that were invoked to justify it." *Id.* at 1528. The court rejected the prisoner's contention that increased inspection provided an easy alternative, holding that the security threat posed by increased guard-to-inmate contact "would adversely affect penal objectives." *Id.* at 1529.

Plaintiffs have not met their burden of showing that the restriction on the wearing of the religious crown impermissibly infringes on their constitutional rights.

3. The Ital Diet

Ital symbolizes a belief in life and an avoidance of symbols of death. Individual dietary practices vary widely among Rastafarian individuals and sects both inside and outside prison. In general, Rastafarians do not eat meat, and almost universally refrain from eating pork. Most Rastafarians abstain from alcohol and caffeine. Some Rastafarians do not eat fish, and some refuse dairy products. Some refrain from eating any foods that have been processed, particularly canned food, believing that the can symbolizes a coffin, or death. Some Rastafarians refuse to eat vegetables that have been cooked for more than a few minutes, believing that overcooking destroys the food's natural value. Rastafarians also object to vegetables that have been treated with non-organic pesticides or fertilizers.

Some Rastafarians will only eat food that is prepared and served in pots and bowls made of natural materials: more specifically, clay pots and calabash bowls. Some Rastafarians will eat only food that they have prepared themselves. Others refuse food that has been prepared by a woman during her menstrual period. Some of the inmates who testified eat meat, dairy products, fish, canned foods from the commissary, and bread made from processed flour.

Whenever pork is served, DOCS provides a meat substitute to all inmates to accommodate the religious requirements of Jewish and Muslim prisoners. No such substitute is offered when

other meats are served. They also offer a kosher food program at Green Haven Correctional Facility, and a neutral diet at other facilities to inmates who have been in the Green Haven program. Most of the vegetables served in DOCS institutions are canned or frozen, because they are more cost-effective and because fresh vegetables are not available all year. Vegetables are prepared by steaming for a maximum of fifteen minutes.

The use of clay or calabash pots and bowls is impracticable because clay is breakable, and it violates New York food preparation regulations which forbid the use of wooden working surfaces other than hard maple. Porous materials can retain and breed harmful bacteria.

It would be both expensive and a severe administrative burden for defendants to provide Rastafarian inmates with a diet containing only natural foods and nutritionally adequate meat substitutes.

Other prisoners understandably resent special treatment that is given to any group, and the possibility of tension and confrontation is particularly troublesome at mealtime, which is often the only time the entire prison population is together.

Defendants provide Orthodox Jewish prisoners with kosher or neutral meals. They provide special meals during Ramadan, and meat substitutes so that Muslim prisoners can follow their religious proscription against pork. To that extent, they do not appear "neutral" as between Jews and Muslims on the one hand and Rastafarians on the other. But the inequality of treatment, if it is perceived as such, reflects the fact that it would be much more difficult to accommodate the Rastafarians because their definitions of an Ital diet are so varied. The complex of dietary restrictions that plaintiffs described would impose undue financial and administrative burdens on defendants to provide an Ital diet that met with the religious views of every Rastafarian inmate.

Plaintiffs do have alternative means of exercising the right: they may receive food from the outside through the prison

package rooms, and they may buy food at the prison commissary. They may also abstain from eating any food provided in the mess hall that offends their religious beliefs. Although it may not be acceptable to all Rastafarians, those who do not reject all dairy products may obtain a nutritionally adequate "ovo-lacto" (i.e., including eggs and dairy products) diet even abstaining from all meat, fish and poultry. *See Udey v. Kastner*, 805 F.2d 1218 (5th Cir. 1986)(prisoner's request for a natural food diet, based on sincerely held beliefs, refused on the basis that it would create undue costs and administrative burdens, and have a potentially disruptive effect on prison discipline).

Kahane v. Carlson, 527 F.2d 492 (2d Cir. 1975), held that the state must provide kosher meals to Orthodox Jewish inmates. Factually, there were few Orthodox Jewish inmates in the custody of DOCS. Further, Kahane sought meals that complied with the laws of Kashruth, which are more well-defined than the dietary practices described by plaintiffs. Defendants' practices here do not run afoul of *Kahane*, read in the light of *Turner* and *O'Lone*, nor do they impermissibly infringe on plaintiffs' First Amendment or Equal Protection rights.

4. Congregate Religious Services

In Jamaica, weekly congregate services last for two days and holiday celebrations last for two weeks. The nature of the services that are held in Jamaica, and the type of services that the prisoners seek, is unclear. DOCS has available no body of established religious doctrine on which it can rely in determining the particular rituals or practices which are appropriate to the Rastafari. Marlon Clarke testified that a typical prayer service in Jamaica would be presided over by an elder, and would involve singing, dancing, chanting and Biblical readings.[3] Ernest Nurse testified that a typical prayer service would consist of psalm readings, prayer and Bible discussion. Jah Bunny testified

[3] It also involves "sharing of the chalice" which is the burning of the "holy herb," i.e., marijuana, (SM 327) but it is assumed that plaintiffs wish congregate services even without that element.

that meetings of Caribbean African Unity, a DOCS-approved cultural organization, begin and end with a prayer, and that a typical religious service would consist of an opening and closing prayer, "reasoning" and playing of drums and chanting.

DOCS will "allow Rastafarians to hold congregate services when and if . . . an outside sponsor comes forth." (Defts' Post-trial Reply Mem., p. 3). Requiring a sponsor from the outside is a reasonable method of authenticating, and maintaining the integrity of, the spiritual purposes of the meeting and its practices. It comports with the institution's responsibility to see that the religious services are genuine and bona fide, and not used as an occasion for extortion, for the holding of kangaroo courts, or for the dissemination of conspiratorial information. (SM 558-9). The free-world-sponsor requirement has been upheld for the same reasons given by defendants. *See Hadi v. Horn*, 830 F.2d 779 (7th Cir. 1987); *Tisdale v. Dobbs*, 807 F.2d 734 (8th Cir. 1986). Its purpose is not to enforce doctrinal conformity, as plaintiffs protest, but to assure that the inmates' meeting serves its professed religious purposes rather than temporal ones which might threaten security. Section 610 of the New York Correction Law provides for religious services "from some recognized clergyman of the denomination."

No sponsor has come forward who has been approved by DOCS. Carol Yawney, an associate professor of anthropology at York University in Toronto, offered to organize a holiday celebration, but DOCS reasonably refused on the basis that she is an academic, not a religious authority. Mr. Daley testified that the tenets of Rastafari do not allow a woman to lead services for men (SM 183). The Reverend Earl Moore testified to good faith attempts he has made to locate and obtain the services of a sponsor.

Nor would the use of inmate religious leaders be acceptable, because inter-inmate leadership struggles pose a security problem. Although some Muslim services are led by inmate imams, they are supervised by outside imams, and DOCS ministerial personnel have an outside resource to contact concerning religious issues. In addition, Phillip Coombe testified that DOCS

is hiring more outside imams to lead services in the prisons, because the use of inmate imams is a security problem. Finally, defendants object on the ground that Jamaican dialect would be spoken during religious services, and that they would have no way of knowing what was being said or controlling what went on during the service.

There is a valid, rational connection between defendants' security concerns and the requirement that a religious group have an outside sponsor in order to conduct congregate religious services. The requirement applies to all religious groups.

There are alternate, although limited, means of expressing the right that remain open to prisoners. They may pray individually in their cells, and may "reason" with other inmates in small groups. Mr. Daly testified this was an adequate substitute for prayer services (SM 172). The meetings of Caribbean African Unity begin and end with Rastafarian prayers. No other easy alternative appears feasible.

Under the circumstances, DOC's position that congregate services await only the presence of an outside sponsor comports with *Turner* and *O'Lone*, and represents a reasonable penological restriction.

CONCLUSION

For the foregoing reasons, defendants are permanently enjoined from enforcing Departmental Directive No. 4914 against members of the plaintiff class. The remainder of plaintiffs' claims are dismissed.

Defendants are to submit a judgment, on consent as to form if possible, within thirty days of the date of this order. By the same time, plaintiffs may submit a counter-judgment reflecting matters of form that cannot be agreed upon.

Dated: New York, New York
March 13, 1989

/s/Louis L. Stanton

LOUIS L. STANTON
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

THOMAS BENJAMIN, ERROL DUNKLEY, FRANK FORREST, BARRINGTON GRAY, NEWTON HANNON, and MARTIN SPENCE, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

— against —

THOMAS A. COUGHLIN, Commissioner, New York State Department of Correctional Services; STEPHEN DALSHIEM, Superintendent, Ossining Correctional Facility; EUGENE S. LEFEVRE, Superintendent, Clinton Correctional Facility; HAROLD SMITH, Superintendent, Attica Correctional Facility,

Defendants.

---------- X

79 Civ. 0232 (LLS)

ORDER

This action having been tried to the court on August 31, September 1, 2 and 3, 1987 and the court having rendered its opinion and order dated March 13, 1989, the Clerk of the Court will enter judgment permanently enjoining defendant from enforcing so much of Departmental Directive No. 4914 as requires members of the plaintiff class entering into the custody of the New York State Department of Correctional Services to undergo an initial haircut for identification and security purposes; and otherwise dismissing the complaint, with costs as provided by law.

So ordered.

Dated: New York, New York
May 19, 1989

/s/Louis L. Stanton

LOUIS L. STANTON
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

THOMAS BENJAMIN, ERROL DUNKLEY, FRANK FORREST, BARRINGTON GRAY, NEWTON HANNON, and MARTIN SPENCE, on their own behalf and on behalf of all others similarly situated,

JUDGE STANTON

Plaintiffs,

— against —

THOMAS A. COUGHLIN, Commissioner, New York State Department of Correctional Services; STEPHEN DALSHIEM, Superintendent, Ossining Correctional Facility; EUGENE S. LEFEVRE, Superintendent, Clinton Correctional Facility; HAROLD SMITH, Superintendent, Attica Correctional Facility,

79 Civil 232 (LLS)

JUDGMENT

Defendants.

---------- X

A non-jury trial before the Honorable Louis L. Stanton, U.S.D.J., having begun on August 31, 1987, and at the conclusion of the trial the Court having reserved its decision; and the Court thereafter on May 22, 1989, having handed down its order, that the Clerk of the Court will enter judgment permanently enjoining defendants from enforcing so much of Departmental directive No. 4914 as requires members of the plaintiff class entering into the custody of the New York State Department of Correctional Services to undergo an initial haircut for identification and security purposes; and otherwise dismissing the complaint, with costs as provided by law, it is,

ORDERED, ADJUDGED AND DECREED: That defendants be and they hereby are permanently enjoined from enforcing so much of Departmental Directive No. 4914 as requires

members of the plaintiff class entering into custody of the New York State Department of Correctional Services to undergo an initial haircut for identification and security purposes, and it is further,

ORDERED, That the complaint be and it is hereby otherwise dismissed with costs as provided by law.

DATED: NEW YORK, NEW YORK
JUNE 16, 1989

/s/ Raymond F. Boughardt

APPROVED:

/s/ Louis L. Stanton
U.S.D.J.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

THOMAS BENJAMIN, ERROL DUNKLEY, FRANK FORREST, BARRINGTON GRAY, NEWTON HANNON, and MARTIN SPENCE, on their own behalf and on behalf of all others similarly situated,

Plaintiffs,

— against —

THOMAS A. COUGHLIN, Commissioner, New York State Department of Correctional Services; STEPHEN DALSHIEM, Superintendent, Ossining Correctional Facility; EUGENE S. LEFEVRE, Superintendent, Clinton Correctional Facility; HAROLD SMITH, Superintendent, Attica Correctional Facility,

79 Civ. 0232 (LLS)

OPINION and ORDER

Defendants.

---------- X

This action was brought pursuant to 42 U.S.C. § 1983 by plaintiff class as members of the Rastafari faith against defendants Thomas A. Coughlin III, Commissioner of the New York State Department of Correctional Services ("DOCS") and the Superintendents of the facilities in which plaintiffs are now incarcerated. Plaintiffs seek a declaration that Rastafarianism is a religion, along with injunctive relief affording them the opportunity to meet as a religious group and follow certain practices of their religion within prison, such as wearing their hair long and eating a special diet. Because some of its members have recently been placed in restrictive confinement for their refusal to cut their hair, plaintiff class now moves for preliminary relief to enjoin defendants from (1) refusing to recognize Rastafarianism as a religion; (2) requiring plaintiffs pursuant to Departmental Directive No. 4914 to have their hair cut while

in defendants' custody; and (3) placing plaintiffs in involuntary protective custody because of their refusal to cut their hair.[1] After reviewing the motion for a preliminary injunction, the court raised the question whether the doctrine of collateral estoppel bars defendants from litigating the issues raised here, *see Williams v. Codd*, 459 F. Supp 804 (S.D.N.Y. 1978); *see also Hedger Trans. Corp. v. Bushey & Sons, Inc.*, 186 F.2d 236 (2d Cir. 1951); *cf. LaRocca v. Gold*, 662 F.2d 144, 148 (2d Cir. 1981), and the parties have fully briefed that issue.

Background

The present action was brought in January 1979. It was discontinued in April 1980 in contemplation of settlement, and reopened in March 1985.

Since its commencement, two New York State court cases involving the issues raised by this motion have been decided against the Commissioner of the Department of Correctional Services and in favor of two Rastafarian inmates.

The first, *Lewis v. Commissioner of the Department of Correctional Services*, No. 85-11167, slip op., (N.Y. S. Ct. August 1, 1985), *aff'd sub nom. People v. Lewis*, 496 N.Y.S.2d 258 (N.Y. App. Div. 1985), was brought by a Rastafarian inmate to challenge the validity of DOCS Directive No. 4914, which requires all male inmates to submit to a haircut and shave for the taking of an initial identification photograph when newly incarcerated. He asserted that cutting his hair or beard violated his religious convictions. The defendant Commissioner argued that the prison facilities need a photograph of each inmate after a haircut and shave, showing his "facial features and contours unobstructed by hair", to facilitate apprehension of escaped convicts who might try to change their appearance by cutting their long hair. Both the Supreme Court, Queens County and the Appellate Division held that the state's objective of prisoner identification and security could be achieved through less restrictive means, by "pulling [the inmate's] locks back tightly behind the head for a photograph". 496 N.Y.S.2d at 260, *see People v. Lewis*, No. 85-11167, slip op. at 5. Both courts held that

Directive No. 4914, in requiring an initial haircut, was unconstitutional as applied to the plaintiff inmate.

In the second case, *Overton v. Dept. of Correctional Services and Thomas A. Coughlin, III*, 499 N.Y.S.2d 860 (N.Y. S. Ct. 1986), another Rastafarian inmate challenged DOCS Directive No. 4914. The defendants there argued both that Rastafarianism is not a religion and that the legitimate security needs of the prison system required initial photographs of newly received inmates in a "clean-shaven, close-haired stated". *Id.* at 862. Both sides moved for summary judgment. The court held that Rastafarianism is a religion and that inmates sincerely holding its beliefs are to be afforded First Amendment protection.[2] It held, "[i]n accordance with the determination . . . in *People v. Lewis*", that DOCS Directive No. 4914 was unconstitutional as applied to the Rastafarian inmate and that the state's "legitimate [security] objectives . . . can be achieved by means of tying back [the inmate's] hair so as to afford a full and unobstructed facial views." *Id.* at 865.

Issue Preclusion Principles

The doctrine of collateral estoppel is that "once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case." *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *LaRocca v. Gold*, 662 F.2d at 148; *see Gramatan Home Investors Corp. v. Lopez*, 414 N.Y.S.2d 308 (N.Y. 1979). Title 28 U.S.C. § 1738[3] requires federal courts to give preclusive effect to state court judgments whenever the courts of that state would do so. *See Allen v. McCurry*, 449 U.S. at 96. "For the bar to apply: (1) the issues in both proceedings must be identical, (2) the issue in the prior proceeding must have been actually litigated and actually decided, (3) there must have been a full and fair opportunity for litigation in the prior proceeding, and (4) the issue previously litigated must have been necessary to support a valid and final judgment on the merits." *Gelb v. Royal Globe Ins. Co.*, No. 85-7667, slip op. at 5025 (2d Cir. August 8, 1986); *Tri-Ex Enterprises, Inc. v. Morgan*

Guaranty Trust Co., 596 F. Supp. 1, 7 n.3 (S.D.N.Y. 1982); *Schwartz v. Public Administrator of County of Bronx*, 298 N.Y.S.2d 955 (N.Y. 1969).

"It is undisputed that a litigant who was not a party to the first action may assert collateral estoppel offensively in a subsequent proceeding against the party who lost the decided issue in the prior case." *Tri-Ex Enterprises v. Morgan Guaranty Trust Co.*, 596 F. Supp. at 7; *see Allen v. McCurry*, 449 U.S. at 95; *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 326-27 (1979). The trial court has broad discretion to determine when to permit the offensive use of collateral estoppel, *see Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. at 331, and should not allow it if it would be unfair to a defendant to bind him to the prior finding. *Ibid; see Tole S.A. v. Miller*, 530 F. Supp. 999, 1003 (S.D.N.Y. 1981) *aff'd*, 697 F.2d 298 (2d Cir. 1982)(former requirement of mutuality has been abandoned and "[i]n its place the courts have adopted a rule that non-mutual issue preclusion is permitted unless it would be unfair").

Discussion

(a) Identity of Issues

The issues resented here are the ones litigated in *Lewis* and *Overton*. The New York Supreme Court in *Overton* squarely addressed and decided both that Rastafarianism is a religion and that DOCS Directive No. 4914 is unconstitutional in requiring a Rastafarian inmate to get an initial haircut. Both determinations were necessary for its decision. Earlier, *Lewis* held that these defendants could not constitutionally require a Rastafarian inmate to get an initial haircut upon commencement of his sentence, since the state could adequately achieve its security objectives by photographing the inmate with his hair pulled back.

The court in *Overton* stated the issues before it as follows (499 N.Y.S. at 861-62):

> The remaining issues having been framed through the submission of voluminous papers, the parties cross-moved for summary judgment.

> The plaintiff, an avowed Rastafarian, contends that enforcement of D.O.C.S. directive No. 4914 would violate his right to the free exercise of religion and to the equal protection of the laws under the First and Fourteenth Amendments of the United States Constitution, Sections 3 and 11 of Article I of the New York State Constitution, and Section 610 of the New York State Correction Law.
>
> The defendants contend that Rastafarianism is not a religion and that the legitimate security needs of the prison system require initial photographs of received inmates in a clean-shaven, close-haired state.

Obliged to "determine whether [Overton's] beliefs are 'religious' and, therefore, protected", (*id.* at 862) the court discussed the law for five pages and held, "the court finds that Rastafarianism meets such a standard" (*id.* at 863) and plaintiff's beliefs "are 'religious' in nature and, therefore, deserving of First Amendment protection" (*id.* at 864). The court then considered whether less restrictive alternatives to haircuts were available. It concluded, following the Appellate Division's determination in *Lewis*, that the DOCS' legitimate security objectives could be achieved by tying back the inmate's hair so as to afford a full and unobstructed facial view.

In *Lewis*, a Deputy Commissioner of DOCS testified at the hearing, in support of DOCS's assertion that Directive 4914 is needed for reasons of security and sanitation, and stated that (496 N.Y.S.2d at 259-60):

> . . . photographs of each inmate are taken after the haircut and shave so that DOCS has a picture that shows the facial features and contours unobstructed by hair. Such photographs can facilitate the apprehension of escaped convicts, especially if they drastically change their appearances by cutting off long hair. He also noted that the haircut makes it easier to decontaminate incoming prisoners of lice.

Nonetheless, the Supreme Court, Queens County (*id.* at 260):

> . . . found that the identification objective would be fully achieved by pulling respondent's locks back tightly behind his head for a photograph so they could not be seen, did not obstruct a full facial view in any event, and enabled the photographer to obtain an accurate picture of the contours of his face and head. It found the same objectives could be achieved, in a similar manner, for side photographs.

The Appellate Division agreed and affirmed, concluding that *(ibid)*:

> Since such alternatives are available, enforcing the directive's haircut requirements would violate respondent's religious rights unnecessarily.

Defendants argue that those cases were different; that the issues in the state courts were "personal to the situations of the individual involved" (pointing to such language as that in *Overton*, 499 N.Y.S.2d at 865: the directive is ". . . unconstitutional as applied to Mr. Overton") while the claims in this case involve the rights of the entire class "and impacts [sic] the State's entire system of inmate reception and identification." Defs.' July 18, 1986 Brief (hereinafter "Defs. Briefs") at 16-17.

No such difference can be extracted from the cases. It is immaterial that plaintiffs Lewis and Overtan did not challenge Directive 4914 as unconstitutional on its face, but only "as applied" to them, *cf. Kines v. Day*, 754 F.2d 28, 30 (1st Cir. 1985) ("challenging a rule as applied often requires more specific allegations of harm than are necessary to test facial validity"), for the holdings apply equally to others similarly situated. The "as applied" analysis does not mean the holdings are limited to those plaintiffs only. Nothing in *Lewis* or *Overton* indicates that those courts rested their decisions on particular characteristics of the individual plaintiffs or distinguished them from other Rastafarian inmates. To the contrary, the *Overton* court rejected

the argument that Mr. Overton's beard is so wispy that he should be excepted from the general rule requiring a clean shaven photograph. Rather, the courts focused on plaintiffs as members of the Rastafari faith and on their interests in adhering to the tenets of that faith. *Compare Wright v. Raines*, 457 F. Supp. 1082, 1090 (D. Kan. 1978)(where plaintiff inmate of Sikh faith challenged prison regulation preventing growth of long hair, court held that defendants were prohibited from enforcing regulation against "a sincere adherent of a recognized religion which requires long hair and a beard as one of its fundamental tenets").

The issues decided by the state courts in *Lewis* and *Overton* are identical to the ones raised by the present application. Indeed, the defendants' brief to the Appellate Division in *Lewis* advised that court that the "issue as to whether Rastafarianism is a religion is being litigated in *Overton*" and this case. (Exh. G to Bromley affidavit of July 18, 1986, p. 3 n.*) The question whether the state can place Rastafarian inmates in involuntary "protective custody" if they refuse to cut their hair is no more than a restatement of the issue whether the defendants can enforce Directive 4914 against Rastafarian inmates on security grounds.*

(b) Full and Fair Opportunity to Litigate

Offensive use of collateral estoppel should not be permitted where it would be unfair to the party against whom it is asserted. *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. at 330. To determine whether a party has had a full and fair opportunity to litigate an issue in a prior action, a court must examine "the realities of [the prior] litigation", *Schwartz v. Public Admin. of Co. of Bronx*, 298 N.Y.S.2d at 961; *see Winters v. Lavine*, 574 F.2d 46, 59 n.14 (2d Cir. 1978), "including the context and other circumstances which . . . may have had the practical effect of discouraging or deterring a party from fully litigating the determination which is now asserted against him". *People v. Plevy*, 436 N.Y.S.2d 224, 228 (N.Y. 1980).

Defendants claim that they "did not fully litigate in state court the broad issues present in the case at bar precisely because of

the pendency of this action. Defs. Brief at 18. They assert that "[b]y agreement of the parties and in recognition of the federal case, no formal or informal discovery by way of document exchange, interrogatories or depositions took place [in the state cases]". (Aff. of Tarquin Jay Bromley, sworn to July 18, 1986, p. 5).

In *Lewis*, the court held a hearing, at which Philip Coombe, Deputy Commissioner for Facility Operations for DOCS, testified for defendants in the presence of plaintiff Lewis. His testimony is set forth at p. 7 above, as summarized by the Appellate Division (496 N.Y.S.2d at 259-60).

In *Overton*, on cross-motions for summary judgment the defendants submitted the affidavits of Mr. Coombe and Tarquin Jay Bromley, Esq., defendants' attorney, and two state court orders requiring two Rastafarian inmates to cut their hair upon commencement of their sentences. Plaintiff submitted affidavits and various articles and materials on Rastafarianism. Defendants informed that court that "if [it] did not grant summary judgment in favor of defendants, they required a full evidentiary hearing concerning the rationale for the Directive and their position that there was no less restrictive alternative than the initial haircut and shave." Bromley Aff. at 6-7. Defendants claim that they decided to proceed without discovery in *Overton* because they were preserving for this court the "broad based" or "larger" issues presented here, *see* Defs. Brief at 18, and because "the federal court [is] the appropriate forum for the deliberative resolution of disputes encompassing complex constitutional issues." *Id.* at 3.

In approaching these matters, a court should consider (1) defendant's incentive to defend vigorously in the first action, focusing in particular on the size of the claim and the foreseeability of future litigation; (2) whether the judgment relied upon as a basis for the estoppel is itself inconsistent with previous judgments in favor of defendant; (3) whether the second action affords the defendant procedural opportunities unavailable in the first action; and (4) whether the plaintiff could easily have joined in the earlier action. *Parklane Hosiery Co.*,

Inc. v. Shore, 439 U.S. at 329-31; *see also Schwartz v. Public Admin. of Co. of Bronx*, 298 N.Y.S.2d at 961; *Winters v. Lavine*, 574 F.2d at 59 n.14. The underlying consideration appears to be "whether the party 'had more than adequate incentive to litigate long and hard' ", and whether it did so. *Winters v. Lavine*, 574 F.2d at 59 n.14, citing *Vincent v. Thomson*, 361 N.Y.S.2d 282, 295 (N.Y. S. Ct. 1974), *rev'd on other grounds* 377 N.Y.S.2d 118 (N.Y. App. Div. 1975); *see Zdanok v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d 944, 956 (2d Cir. 1964).

These defendants had ample opportunity and incentive to litigate in the state court actions. Both *Lewis* and *Overton* involved challenges by a Rastafarian inmate to Directive 4914's requirement that they cut their hair upon commencement of their sentences. None of the state court opinions indicates that its holding is based on any particular personal characteristics of Lewis or Overton. None defers to a future decision by this court. Under the circumstances, and with knowledge of the class action pending in this court, defendants "clearly must have foreseen the possible preclusive consequences arising from an unfavorable decision in the [state court] action[s]." *Winters v. Lavine*, 574 F.2d at 59 n.14; *see Zdanock v. Glidden Co., Durkee Famous Foods Div.*, 327 F.2d at 957 (C.J. Lumbard, concurring) ("I . . . concur in the [application] of the collateral estoppel doctrine . . . [since] . . . it is clear that when the defendant elected to rest its case . . . — a case involving merely five employees — it was fully aware of the Alexander case, then pending in the state court for about two years, which involved some 160 employee-plaintiffs). Mere concern for the precedential value the New York State court decisions must have in this case should have provided the parties with incentive to litigate with vigor.

Defendants' decision in *Overton* to move for summary judgment and forego discovery was made at their own peril. Defendants are not entitled to federal relitigation of an issue because a strategy decision in a prior state court action may have been improvident.

It is well understood that "state courts have the same duty as the federal courts to uphold the federal Constitution",

United States ex rel. Hill v. Johnston, 321 F. Supp. 818, 820 (S.D.N.Y. 1971), and once a federal issue has been decided in state court, the litigants are not necessarily entitled to relitigate it in federal court. *See Allen v. McCurry*, 449 U.S. at 104; *compare England v. Louisiana State Bd. of Med. Exam.*, 375 U.S. 411 (1964) (in cases where, but for the application of the abstention doctrine, the primary fact determination would have been by the District Court, a litigant may not be unwillingly deprived of that determination).

Defendants have submitted here several hundred photographs of Rastafarian inmates with their hair both long and short, i.e., "before" and "after" pictures, as evidence of the urgency of defendants' security interests. They assert that the photographs were not relevant to the *Overton* case "since the issue was solely Mr. Overton's own appearance". Defs. Brief at 22. As shown above, the issue in *Overton* necessarily affected all Rastafarians similarly situated, and DOCS must have been aware of the doctrine of *stare decisis*. Defendants claim that the photographs were not available at the time of the state court actions because plaintiffs had not provided a list of inmates who claimed to be Rastafarians, and that this federal action provides them "the procedural opportunity to put on [this] evidence". *Id.* at 21. Defendants, who had the Rastafarians in their custody, do not explain what efforts they made to obtain a list of them, or why the photographs could not equally well have been assembled and used in *Overton*. *See Winters v. Lavine*, 574 F.2d at 60 n.14.

Defendants make two additional arguments that they have not been provided a full and fair opportunity to litigate the issues presented in plaintiffs' motion. First, they assert that there are prior state court judgments inconsistent with *Lewis* and *Overton*, and decided in defendants' favor. While a court should not allow the use of offensive collateral estoppel against a defendant where "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant", *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. at 330, that is not the case here. The decisions proffered by defendants do not address the issue of Rastafarianism's judicial standing as a religion, nor the question of whether the

directive impermissibly infringes on the rights of Rastafarianism's adherents since the state can achieve its objectives by a less intrusive means, which are the crucial issues here and in *Lewis* and *Overton*.

Second, defendants contend that this plaintiff class could have joined the state court actions, and its failure to do so amounts to an election to litigate in federal court. The Supreme Court has stated that it is not fair to a defendant to allow the use of offensive collateral estoppel "where a plaintiff could easily have joined in the earlier action". *Parklane*, 439 U.S. at 331. The court's concern was that "the plaintiff has every incentive to adopt a 'wait and see' attitude, in the hope that the first action by another plaintiff will result in a favorable judgment." *Id.* at 330. That is not the situation here. Far from assuming a "wait and see" attitude, the plaintiff class commenced this action in January 1979, six years prior to the *Lewis* and *Overton* actions.

Although the effect of the foregoing is to deprive the DOCS of a further hearing for which it prepared in the hope of final vindication, the doctrine applied here is one that serves broad and important public purposes. As stated by the Supreme Court in *Commissioner v. Sunnen*, 333 U.S. 591, 597 (1947)

> The general rule of *res judicata* applies to repetitious suits involving the same cause of action. It rests upon considerations of economy of judicial time and public policy favoring the establishment of certainty in legal relations.

and in *Allen v. McCurry*, 449 U.S. at 95-96

> Thus, res judicata and collateral estoppel not only reduce unnecessary litigation and foster reliance on adjudication, but also promote the comity between state and federal courts that has been recognized as a bulwark of the federal system.

Conclusion

The issues presented here are identical to those decided by the New York State courts in *Lewis v. Commissioner of DOCS* and

Overton v. Coughlin. Defendants had full and fair opportunity to litigate these issues in those actions. They are precluded by the doctrine of collateral estoppel from relitigating those issues here.

Accordingly, plaintiffs' motion for preliminary relief is granted as a matter of law. Defendants are enjoined from requiring plaintiffs to have their hair cut for identification photographs while in defendants' custody and from placing plaintiffs in involuntary protective custody for refusing to have their hair cut for that purpose.

Dated: New York, New York
August 29, 1986

/s/Louis L. Stanton

LOUIS L. STANTON
U. S. D. J.

Footnotes

1. Plaintiffs assert three additional claims in the underlying action, that defendants (1) refuse to allow plaintiffs to gather for religious meetings; (2) do not provide plaintiffs with a diet consistent with Rastafarian dietary laws; and (3) do not permit plaintiffs to wear their religious headgear. Those claims are not in issue on this motion.

2. In neither *Lewis* nor *Overton* was the sincerity of the inmates' beliefs contested. Here, if defendants wish to challenge the sincerity of plaintiffs' beliefs, they may do so in an appropriate administrative hearing. *See Moskowitz v. Wilkinson*, 432 F. Supp. 947, 951 n.13 (D. Conn. 1977).

3. 28 U.S.C. § 1738 states:

> "[J]udicial proceedings of any court of any state] . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State . . ."

4. The records of the "due process hearings" accorded plaintiffs before they were placed in protective custody show that the only inquiry at the hearing was whether the Rastafarian inmate would allow his hair to be cut pursuant to Directive No. 4914. If not, he was placed in restrictive confinement.

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES

DIRECTIVE

CLASSIFICATION No. 4914

DISTRIBUTION A & B

DATE 1/5/84

SUPERSEDES Directive No. 4914 dtd. 1/18/82 & Revision Notice dtd. 2/2/82

SUBJECT

INMATE GROOMING STANDARDS

APPROVING AUTHORITY
/s/Arthur A. Leonardo

I. *DESCRIPTION*

This directive establishes the basic grooming standards (including criteria for beards, mustaches, and length of hair) for inmates.

II. *STANDARDS*

Reference is made to Rule 3.20 of the Standards of Inmate Behavior: "Beards and mustaches are not to exceed one (1) inch in length."

It is especially important that inmates who are assigned to temporary release programs present a "neat and clean" appearance.

III. *REGULATIONS*

A. Initial Haircut and Shave at Reception

Males received as new commitments shall get an initial haircut and shave for reasons of health and sanitation as well as to permit the taking of the initial identification photograph. Hair length upon completion of this initial haircut shall not exceed one (1) inch on any part of the head. For the purpose of the initial clean shaven identification photograph, inmates who have a beard upon reception shall be permitted the option to use an electric razor, hand razor, hand clippers, or depilatory to remove their beard.

B. General Grooming Standards

After the initial haircut and shave, general grooming standards as set forth below are applicable to all inmates.

1. Beards and Mustaches

All inmates may grow a beard and/or mustache not to exceed one (1) inch in length.

2. Hair

a. Hair may be permitted to grow over the ears to any length desired by the inmate. The corn row style is allowed. The hair must be neatly groomed and kept clean at all times.

b. When an inmate wears long hair and is assigned to work near machinery or food, he will be required to wear a hair net.

c. Inmates wearing long hair will be required to have the hair tied back in a ponytail with a barrette, rubber band, or other fastening device approved by the Superintendent. This restriction

does not apply to American Indians involved in scheduled and approved Indian cultural ceremonies.

d. An inmate may be subjected to a hair search when there is reason to believe that contraband may be discovered by such a search. He may be subjected to such search at any time that a pat or strip frisk is being conducted.

C. Photographs

If, in the opinion of a Correction Officer or Supervisor, an inmate drastically changes his apperance by changing the length of his hair or growing or shaving a beard and/or mustache, he will be rephotographed for identification purposes. All such rephotographs will be at the expense of the inmate.

STATE OF NEW YORK
DEPARTMENT OF CORRECTIONAL SERVICES

DIRECTIVE

CLASSIFICATION No. 4914

DISTRIBUTION A & B

DATE 12/4/86

SUPERSEDES Directive No. 4914 dtd. 1/5/84*

SUBJECT

INMATE GROOMING STANDARDS

APPROVING AUTHORITY
/s/

I. *DESCRIPTION*

This directive establishes the basic grooming standards (including criteria for beards, mustaches, and length of hair) for male inmates.

II. *PURPOSE*

It is the purpose of this directive to ensure that inmate appearance will be regulated sufficiently to maintain accurate identification of each individual.

---

* Please remove and destroy the items identified in the "supersedes box."

III. *REGULATIONS*

A. Grooming Standards at Reception

1. Initial shaves and haircuts shall be required of all newly committed male inmates (unless exempted as set forth below in Sectioin III-A-2). These are required for reasons of health and sanitation as well as to permit the taking of the initial identification photograph.

a. Shaves

Inmates who have beards upon reception shall be permitted the option to use an electric razor, hand razor, hand clippers, or a depilatory to remove their beards.

b. Haircuts

Hair length upon completion of this initial haircut shall not exceed one (1) inch on any part of the head.

2. Exemptions

a. The initial shave regulation applies to all inmates including Rastafarians unless the inmate possesses a court order restraining the Department from such enforcement.

NOTE: Inmates who, pursuant to 2-a above are exempted by court order from the shave regulation, shall be placed in the extended classification unit at the Downstate reception center or in administrative protective custody at all other facilities. Counsel's Office shall be notified of all such inmates.

b. Any reception inmate who professes to be a Rastafarian and refuses to have an initial haircut cannot be forced or ordered to comply with the initial haircut requirements.

c. Any reception inmate who refuses to comply with the initial haircut regulation on religious grounds and who has a *court order* restraining the Department from enforcing the initial haircut regulation cannot be forced or ordered to comply with the initial haircut regulation.

NOTE: Any inmate covered by 2-b and c above shall be classified and transferred in the standard manner.

Any inmate covered by 2-b and c above cannot be disciplined or placed in administrative protective custody for his refusal on religious grounds to have an initial haircut.

3. Any reception inmate who refuses to comply with the initial haircut regulation on religious grounds and:

a. does not profess to be a Rastafarian, or

b. does not have a court order;

shall be ordered to comply with the initial haircut regulation. If he refuses, his hair shall not be cut, but the inmate shall be placed in the extended classification unit at the Downstate reception center or administrative protective custody at all other facilities.

4. Photographs

Identification photographs of any inmate who has not had his hair cut shall be taken in accord with the following:

a. For the frontal view, the hair shall be pulled back away from the face and ears.

b. For the side view (profile), the hair shall be pulled back and to the side.

B. General Grooming Standards

After the initial haircut and shave, general grooming standards as set forth below are applicable to all inmates.

1. Beards and Mustaches

All inmates may grow a beard and/or mustache not to exceed one (1) inch in length. This requirement shall be enforced in all cases except when an inmate has a court order restraining the Department from such enforcement.

2. Hair

a. Hair may be permitted to grow over the ears to any length desired by the inmates. The corn row style is allowed. The hair must be neatly groomed and kept clean at all times.

b. Long hair is defined as shoulder length or longer.

c. Inmates wearing long hair assigned to work near machinery or food shall be required to wear a hair net. Any other inmate assigned to work near food shall be required to wear either a hat or a hair net.

d. All inmates wearing long hair will be required to have the hair tied back in a ponytail at all times with a barrette, rubber band, or other fastening device approved by the Superintendent.

Exception: American Indians involved in scheduled and approved Indian cultural ceremonies do not have to comply with this restriction.

e. An inmate may be subjected to a hair search when there is reason to believe that contraband may be discovered by such a search. He may be subjected to such search at any time that a pat or strip frisk is being conducted.

3. Photographs

If, in the opinion of a Correction Officer or Supervisor, an inmate drastically changes his appearance by changing the length of his hair or growing or shaving a beard and/or mustache, he will be rephotographed for identification purposes. All such rephotographs will be at the expense of the inmate.

DECISION OF SUPREME COURT, QUEENS COUNTY
(DUNKIN, J.)

SUPREME COURT
CRIMINAL TE

No. 11167/85

ALFREDO LEWIS

BY DUNKIN, J.

VS.

DATED
August 1, 1985

COMMISSIONER OF DEPARTMENT OF CORRECTIONAL SERVICES OF THE STATE OF NEW YORK

Defendant, in a criminal proceeding, seeks to prevent the infringement of his religious beliefs as a Rastafarian upon his entry into a State correctional facility. He requests injunctive and declaratory relief in the form of a third-party action within the criminal proceeding. Since this court has jurisdiction over the parties, pursuant to CPLR 103(c), this application is deemed a motion for summary judgment within a declaratory judgment action to challenge the validity of Directive #4914 of the New York State Department of Correctional Services (hereinafter "DOCS") pertaining to the grooming standards of inmates.

Plaintiff, a convicted felon, currently is awaiting sentencing and transfer to a State facility. As provided in Directive #4914, upon his entry, an initial haircut and shave is required of all male inmates:

> "Males received as new commitments shall get an initial haircut and shave for reasons of health and sanitation as well as to permit the taking of the initial identification photograph. Hair length upon completion of this initial haircut shall not exceed one (1) inch on

> any part of the head. For the purpose of the initial clean shaven identification photograph, inmates who have a beard upon reception shall be permitted the option to use an electric razor, hand razor, hand clippers, or a depilatory to remove their beard."

Thereafter, hair may be grown to any length but beards and mustaches may not exceed one inch in length.

Philip Coombe, the Deputy Commissioner of Operations for DOCS, testified that the rationale behind the directive primarily stems from a facility's need to maintain a photographic file of an inmate in the case of an escape. Inasmuch as an inmate's hair and beard may be regrown when his appearance changes during his incarceration, he is rephotographed and the photo is placed in his permanent file. Maintenance of hygiene within the institution is aserted as a secondary purpose of the directive.

Plaintiff, an avowed Rastafarian, has not cut his hair for the past 20 to 25 years and wears his three to four-foot length hair in dreadlocks. The shaving of plaintiff's facial hair is also contested as an encroachment upon his religious beliefs. There is no dispute before the court concerning the sincerity of plaintiff's convictions or whether these beliefs are an integral facet of his religion.

Although convicted prisoners do not forfeit all of their constitutional rights upon confinement (*Bell v. Wolfish*, 441 US 520), these rights are subject to restrictions and must be weighed against an institution's needs and policies. (*Wolff v. McDonnell*, 418 US 539.) Thus, an inmate must be given a reasonable opportunity to exercise his First Amendment right of freedom of religion to the extent it does not interfere with legitimate penological objectives. (*Pell v Procunier*, 417 US 817; *Cruz v Beto*, 405 US 319; *Burgin v Henderson*, 536 F2d 501.) A regulation which infringes upon First Amendment rights will be upheld only if it furthers a substantial governmental interest such as security, order or rehabilitation and the freedom limited is no greater than is necessary to protect the interest involved. (*Procunier v Martinez*, 416 US 396.)

In the factually similar case of *Phillips v Coughlin*, (81 Civ 7565, US Dist Ct, SDNY, May 4, 1984, Conner, J.), the precise directive under constitutional attack herein was dealt with by that court. Phillips, a Rastafarian entering into the custody of DOCS, also claimed Directive #4914 violated his First Amendment right to the free exercise of religion. There, Phillips' beard was involuntarily shaven but his hair was permitted to remain long. As stated in the opinion:

> "**** shaving is one of the most basic, easily accomplished, and drastic changes that a man with a beard can make to his appearance. By ensuring that it can identify its prisoners either cleanshaven or with facial hair, DOCS lessens the effectiveness of this form of disguise, whether used alone or in conjunction with other methods of subterfuge. While not a perfect counter to prisoners' efforts to escape and avoid detection,[3] it surely increases the likelihood that a missing inmate will be identified and successfully recaptured. Thus, I find that the State has a strong interest in taking and maintaining[4] a clean-shaven photo of all inmates in DOCS's custody."[5] (p 9)

After considering an inmate's right to the free exercise of religion, the court held Directive #4914 the least intrusive method available for satisfying the penological interest involved. Although the issue of Philipps' dreadlocks was not before the court, the matter was discussed in its footnote number 2:

> "**** a prisoner's religious interest does not necessarily apply with equal force to justify Directive #4914's requirement of a haircut. The identification purpose for such a haircut may well be adequately satisfied by the less intrusive alternative of simply tying the inmate's hair back for purposes of the initial photograph."

In the instant case, DOCS has also set forth security reasons for the necessity of the initial shave and haircut. This court is in agreement with *Phillips v Coughlin (supra)* with respect to the legitimate purpose served by the initial shave. In the absence

of an identification photo depicting a clean shaven inmate, DOCS has no means of determining the underlying facial structure of the prisoner which is clearly needed to facilitate the recapture of an escapee who may disguise his appearance. The encroachment upon an inmate's freedom is minimized by the subsequent permission to regrow facial hair.

However, the security reasons which must prevail in the case of initial shaves are not justified when applied to the initial haircut. Pursuant to the directive, hair length after the haircut is not to exceed one inch on any part of the head. At the hearing, Deputy Commissioner Coombe conceded that plaintiff has a receding hair line and that the hair on the top of plaintiff's head appears to be one inch or less in length, therefore conforming to the requirement. It was further conceded that when plaintiff pulls his long hair back or around to the opposite side, a full-face view as well as a side view are totally unobstructed by the dreadlocks and conforms to the requirement. The mere need of a uniform regulation as argued by DOCS is insufficient to permit the infringement upon plaintiff's First Amendment rights.

> "But even if the institutional purpose is legitimate and substantial, 'that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' (*Shelton v Tucker*, 364 US 479 citations omitted.)" (*Sostre v Preiser*, 519 F2d 763, 764.)

Thus, a governmental rule is not the end in itself. It is the purpose to be achieved that must be primarily considered when the same ends can be achieved without curtailing an individual's freedom of religion — even in such matters as the length of his hair — the court must be creative in fashioning a reasonable solution. Here, the institutional requirement with respect to security and prisoner identification can be met through other viable and less restrictive means. (See *Monroe v Bombard*, 422 F Supp 211.) The pulling back of plaintiff's hair achieves the penological objective sought. This alternative permits the public objective of security, as well as the individual's right to exercise his First

Amendment rights, to be accommodated without infringing on either interest. Unlike the growing or shaving of a beard, the changing of the length of one's hair is a less effective method of disguising one's appearance.

The facts of this case can be distinguished from *Matter of Solomon v Coughlin* (89 AD2d 1945). In that case, an American Indian protested the cutting of his hair upon entry into the state penal system as an abridgement of his freedom of religion. The court held that the directive in dispute, which was similar to the one presently in question, satisfied the institution's needs without suffering from overbreadth and did not interfere with an inmate's practice of religion. However, a review of the record on appeal evidences that the feasibility of a more narrow approach, such as the one proposed by the court herein, was never raised nor litigated in that court. Therefore, the reasoning in that decision does not apply.

Turning next to the contention that the haircut is necessary for hygienic reasons, DOCS has also admitted that other effective means such as showers exist to accomplish this purpose. Since inmates are permitted to regrow their hair and would thereafter be subject to the same hygiene problems, this reason does not merit further discussion by the court.

Hence, Directive #4914, which presents a rational objective on its face, is sufficient to justify the initial shave. However, the failure to provide for reasonable alternatives which would result in compliance with requirements for haircuts renders it violative of plaintiff's First Amendment rights and cannot withstand constitutional scrutiny.

The court notes that the directive requiring initial haircuts applies only to male prisoners and not to females. Although plaintiff has raised the issue of equal protection, in view of this court's determination to partially invalidate the directive for the reasons set forth above, the court will not rule upon the argument.

Accordingly, for all the reasons stated, plaintiff is directed to undergo an initial shave but may retain his dreadlocks in accordance with his religious beliefs.

Settle order.

_____

J.S.C.

SUPREME COURT - STATE OF NEW YORK
SPECIAL TERM, PART I/WESTCHESTER COUNTY

Present: Hon. LOUIS C. PALELLA, Justice.

---------- X
IN THE MATTER OF HORACE ELLIS,

Petitioner

AN APPLICATION FOR AN ORDER TO DIRECT THE RESPONDENT COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONAL SERVICES FROM HAVING TO CUT INMATE HAIR,

— against —

NORWOOD JACKSON, WARDEN, WEST. COUNTY JAIL AND THOMAS A. COUGHLIN, III COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF CORRECTIONS,

Respondents.
---------- X

Filed
and
Entered
on 7-9-85
WESTCHESTER
COUNTY
CLERK

Index Number
10446, 1985
Motion Date
7/3/1985
Motion Cal.
No. 67

The following papers numbered 1 to 4 read on this application for a restraining order.

Order to Show Cause — Affidavits and Exhibits, papers numbered 1-2.

Answering Affidavits and Exhibits, papers numbered 3-4.

Upon the foregoing papers it is ordered that this motion is disposed of as follows.

Petitioner submits an Order to Show Cause for an order restraining Respondent Commissioner from cutting petitioner's hair on the grounds that it is against his religious beliefs.

A directive from the State of New York Department of Correctional Services provides for the cutting of hair as part of the health and sanitary procedures of the jail.

The Court finds that inmate grooming is an important consideration in jail population and is reasonably related to health sanitary and security needs. The application is hereby denied.

HORACE ELLIS, Westchester County Jail, Box 10, Valhalla, New York 10595

ROBERT ABRAMS, ESQ., Attorney General, Two World Trade Center, New York, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

---------- X

In the Matter of Rene Chapman,

Petitioner,

An Application for an Order to Direct the Respondent Commissioner of the New York State Department of Correction Services, from having to cut inmate hair,

— against —

NORMAN JACKSON, et al,

Respondent.

DECISION AND ORDER
Index No. 11046/85
Cal: 7/11/85 #78

---------- X

BEISNER, J.

Petitioner has submitted a defective application to prevent the Department of Correction Sesrvices from cutting his hair. Petitioner claims to be a Rastafarian, a religion which prohibits the cutting of hair.

In a decision that is squarely on point with the instant case, the Appellate Division, Third Department held in the *Matter of Donald Salomon v. Thomas A. Coughlin, 89 A D 2d 1045*, that "entry haircuts for the purpose of identification is entirely reasonable and non-violative of the constitutional right to freely practice religion."

This is dispositive of the issue at hand, and accordingly, petitioner's application is denied.

Dated: September 3, 1985

/s/

J.S.C.

(7)

No. 90-307

In The

SUPREME COURT OF THE UNITED STATES

October Term 1990

[illegible] A. COUGHLIN, Commissioner, New York State Department of [illegible] Services; STEPHEN DALSHEIM, Superintendent, [illegible] Facility; EUGENE S. LeFEVRE, Superintendent, [illegible] Facility; and HAROLD SMITH, Superintendent, [illegible] Facility,

Petitioners,

-against-

[illegible] BENJAMIN, ERROL DUNKLEY, FRANK FORREST, BARRINGTON [illegible] [illegible]ON HANNON and MARTIN SPENCE, on behalf of all others similarly situated,

Respondents.

RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT SELCOV (Counsel of Record)
STEPHEN LATIMER
DAVID C. LEVEN
Prisoners' Legal Services of New York
2 Catharine Street
Poughkeepsie, New York 12601
(914) 473-3810

Attorneys for Respondents

21 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Other Authority

QUESTIONS PRESENTED

1. Does the decision of the Second Circuit enjoining the Department of Correctional Services (DOCS) from cutting Rastafari inmates' hair in violation of their sincerely held religious beliefs comport with this Court's decisions in Turner v. Safley, 482 U.S. 78 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987)?

2. Do the decisions of the courts below precluding petitioners from relitigating the identical issue that they had previously lost in the state courts present an unsettled question of national importance?

STATEMENT OF THE CASE

A. The Religious Belief

Rastafari as a religion was founded in Jamaica, West Indies, following the coronation of Haile Selassie I as Emperor of Ethiopia in 1930. The religion has existed continuously since that time.

It is a fundamental tenet of Rastafari that the hair be neither cut nor combed. As a result, their hair forms into ropelike strands that are called dreadlocks. Dreadlocks are a consecration and a covenant with God. The proscription has its source in the Old Testament, Numbers, ch. 6, and Leviticus, ch. 21. Rastafari believe that these two passages require them to

take the "vow of the Nazarite" never to cut their hair. Dreadlocks are a consecration and a covenant with God.

B. Procedural History

Respondents commenced this action in 1979. While the case was pending, Mr. Lewis and Mr. Overton moved in the state courts to enjoin the initial haircut upon entry into the New York State prison system. Lewis v. Commissioner of the Department of Correctional Services, No. 85-11167 (N.Y. Sup. Ct. Queens Co. 1985), aff'd sub nom. People v. Lewis, 115 A.D.2d 597 (2d Dept. 1985), aff'd, 68 N.Y.2d 923 (1986), Overton v. Department of Correctional Services, 131 Misc. 2d 295 (Sup. Ct. Kings Co. 1986), aff'd, 133 A.D.2d 744 (2d Dept. 1987), appeal dismissed as moot, 72 N.Y.2d 838 (1988). The crux of the Court of Appeals' holding in Lewis is:

> Plaintiff urges that the regulation must be stricken because it does not constitute the "least intrusive means" of satisfying defendant's administrative concern"; defendant contends that the regulation should be upheld because it does not represent an "exaggerated response" to his legitimate penological interests. Both lower courts found that, as to plaintiff, the asserted objective of the regulation in issue could be fully achieved simply by pulling his hair back when the initial identification photographs are taken. This affirmed finding is supported by the testimony of a deputy commissioner in the Department of Correctional Services; and a sufficient showing was not made here of administrative burden. In this instance, therefore, defendant's interest can be readily satisfied without any interference with plaintiff's beliefs. Thus, whichever test is

> adopted, on this record the regulation as applied to plaintiff needlessly infringes on his beliefs, and cannot stand.

While Lewis was pending in the Court of Appeals the District Court issued its preliminary injunction based upon doctrines of issue preclusion. Benjamin v. Coughlin, 643 F.Supp. 351 (S.D.N.Y. 1986).

In June, 1987, petitioners moved to vacate the preliminary injunction on the ground that this Court's decisions in Turner v. Safley, 482 U.S. 78 (1987), and O'Lone v. Estate of Shabazz, 482 U.S. 342 (1987), changed the applicable legal standard. The District Court reserved decision on the motion until after trial, and heard evidence on all plaintiff's claims, including the haircut issue.

Based on the evidence presented, the District Court adhered to it's earlier ruling on the preclusion question, and held that respondents satisfied their burden under Safley/Shabazz. Benjamin v. Coughlin, 708 F.Supp. 570 (S.D.N.Y. 1989). The Court of Appeals affirmed. Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990).

C. The Trial

In a four day bench trial the District Court heard testimony of several class members, including Messrs. Lewis and Overton. The court viewed photographs of Messrs. Lewis and Overton with their hair tied back, as well as hundreds of photographs

introduced by petitioners, of prisoners both before and after their initial haircut.

Deputy Commissioner Coombe testified in both Benjamin and Lewis. He contradicted himself several times, and contradicted testimony that he gave in Lewis. He also contradicted testimony that he gave in Fromer v. Scully, 649 F. Supp. 512 (S.D.N.Y. 1986), aff'd, 817 F.2d 227 (2d Cir. 1987), vac. and remanded, 484 U.S. 909 (1987), on remand, 837 F.2d 1086 (2d Cir. 1987), on remand, 693 F. Supp. 1536 (S.D.N.Y. 1988), rvsd., 874 F.2d 69 (2d Cir. 1989), that, together with fingerprints, it is a person's facial structure that is the primary means of identification. Based on the photographs, and it's observation of Commissioner Coombe, the court found his testimony unpersuasive. That finding should not be disturbed on appeal.

D. The Decisions Below

After reviewing the evidence, including the photograph introduced by both petitioners and respondents and the testimony of Commissioner Coombe, the district court found that tying the hair back is an accommodation that satisfies prison authorities' security concerns. It further found that the accommodation has no more than a de minimis impact on valid penological interests.

The Second Circuit said that "after reviewing the voluminous record and hearing testimony from both Rastafarian inmates and prison officials the district court determined that

pulling plaintiffs' hair back met the purported security needs." Benjamin, 905 F.2d at 576-577. It then held that "tying plaintiffs' hair in pony tails adequately accommodates the interests of prison authorities in revealing an inmate's cranial and facial features." Id. at 577.

The Second Circuit also found that "defendants presented much of the same evidence" to the state courts in Lewis that they presented to the District Court here. Id. at 576. Thus, it found that there was a substantial overlap of evidence and arguments both in courts, citing Restatement (Second) of Judgments sec. 27 comment c (1982), and Koch v. Consolidated Edison Co. of New York, 62 N.Y.2d 548 (1984). Likewise, the district court, in it's decision after trial, found that the same evidence was presented in both cases, and found no reason to alter it's earlier decision on the preclusion question.

Finally, the Second Circuit considered petitioners arguments that this Court's decisions in Safley and Shabazz worked an intervening change in the law. The Court noted that "Lewis considered two levels of scrutiny and found that even under a standard more burdensome to the plaintiffs than the Turner/Shabazz reasonableness standard, plaintiffs would

prevail."[1] 905 F.2d at 576.

ARGUMENT

POINT I

THE COURTS BELOW PROPERLY APPLIED THE DOCTRINE OF ISSUE PRECLUSION.

The first question presented by petitioners for review by this Court is whether the haircut rule satisfies constitutional requirements. However, the Circuit Court also declared the rule invalid under principles of collateral estoppel, and that holding provides an independent basis for the court's judgment affirming the injunction. Therefore, this Court must first find that the collateral estoppel question is deserving of its consideration before considering the petitioner's first question presented.

The Second Circuit found that petitioners were precluded from litigating the initial haircut on three grounds. First, in Lewis and Overton it had a strong incentive, and a full and fair opportunity, to litigate the issue. Second, because those cases were actually litigated to New York's highest court, the policy considerations of U.S. v. Mendoza, 464 U.S. 154 (1984), do not apply. Third, Lewis was decided under an existing standard

---

1. The Second Circuit also found that because Lewis went to the New York Court of Appeals, the policy considerations of U.S. v Mendoza 464 U.S. 154 (1984) were satisfied. Petitioners mention Mendoza only in a footnote in their petition.

that was more burdensome to respondents than the subsequent Safley/Shabazz reasonableness standard. In this court, petitioners urge error primarily on the last point, and argue that an intervening change in the law renders issue preclusion inapplicable.

The Second Circuit's decision is in accord with earlier decisions of this Court, and presents no issue of national importance. As petitioners recognize, the question of the preclusive effect to be given to the prior state court judgments is determined by the law of New York. 28 U.S.C. 1738. Thus, the question presented does not affect the entire nation, nor even all of the Second Circuit. This question of New York law can best be answered by the lower courts, who are more accustomed to deciding such questions than is this Court.

The basic rule of collateral estoppel was stated long ago by the Court in Southern Pacific Ry. Co. v. U.S., 168 U.S. 1, 48 (1897), cited in U.S. v. Moser, 266 U.S. 236, 241 (1924):

> The general principle announced in numerous cases is that a right, question, or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies; and even if the second suit is for a different cause of action, the right, the question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established, so long as the judgment in the first suit remains

unmodified.

This rule has been reiterated and refined in many cases including Commissioner of Internal Revenue v. Sunnen, 333 U.S. 591 (1948), and Montana v. U.S., 440 U.S. 147, 153 (1979), where the Court said:

> Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979); Scott, Collateral Estoppel by Judgment, 56 Harv.L.Rev. 1, 2-3 (1942); Restatement (Second) of Judgments Sec. 68 (Tent. Draft No. 4, Apr. 15, 1977) (issue preclusion).

Issue preclusion applies even if the first case was decided on a different cause of action, Mendoza, Montana, or on an erroneous application of the law.[2] Moser.

Montana was decided thirty-one years after Sunnen and was developed from later precedents, including Parklane Hosiery v. Shore, 439 U.S. 645 (1979). It involved the constitutionality of the Montana gross receipts tax, while Sunnen involved tax liability of separate and distinct transactions for two different

---

2. In this context it matters not how the Appellate Division decided Overton. Lewis, having been decided by the Court of Appeals, is the controlling case under New York law. Even if Overton misinterpreted New York law, under the principles discussed herein, issue preclusion applies.

tax years.[3] For that reason the present case is closer to Monta-

---

3. At p. 7 of the petition, DOCS purports to quote the statement of the law from Sunnen. That quote is truncated and taken out of context. A full reading shows that it concerns tax liability, and is concerned with preventing tax inequity among similarly situated taxpayers. For instance, they quote the Court as saying:

> The principle of collateral estoppel...is designed to prevent repetitious lawsuits over matters which have...remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous...

while the Court actually said:

> But a subsequent modification of the significant facts or a change or development in the controlling legal principles may make that determination obsolete or erroneous, at least for future purposes. If such a determination is then perpetuated each succeeding year as to the taxpayer involved in the original litigation, he is accorded a tax treatment different from that given to other taxpayers of the same class. As a result, there are inequalities in the administration of the revenue laws, discriminatory distinctions in tax liability, and a fertile basis for litigious confusion. Compare United States v. Stone & D. Co., 274 U.S. 225, 235-236. Such consequences, however, are neither necessitated nor justified by the principle of collateral estoppel. That principle is designed to prevent repetitious lawsuits over matters which have once been decided and which have remained substantially static, factually and legally. It is not meant to create vested rights in decisions that have become obsolete or erroneous with time, thereby causing inequities among taxpayers.

To apply issue preclusion here will not provide "a fertile basis for litigation confusion" but will grant uniform treatment of all persons who have beliefs similar to plaintiffs.

na than Sunnen.

In Montana the federal government sued twice in the state courts to overturn the gross receipts tax and lost on both occasions. It then brought an action in federal court. The Supreme Court found that the Montana Supreme Court had "decided the precise constitutional claim that the United States advances here." 440 U.S. at 156, and held that it was precluded from relitigating the issue a third time.

Here the same First Amendment issues were raised in the state and federal court proceedings. Deputy Commissioner Coombe testified in both cases about the security concerns of petitioners policy. Photographs were introduced in both cases, although more were introduced by the state in the federal action. Thus, the same basic evidence presented here was first presented to the state courts, and the court decided "the precise constitutional claim," Montana, 440 U.S. at 156, presented here. Petitioners were properly precluded from relitigating the issue. Southern Pacific Ry., Moser, and Montana.

Petitioners argue that because Safley and Shabazz were decided after the New York Court of Appeals decided Lewis, they should not be precluded from litigating the issue in the federal action, citing Sunnen. There, however, the change in the law was unfavorable to the taxpayer, and he argued that preclusion applied. The Lewis court, however, decided the issue under a more

stringent standard than Safley/Shabazz. Those decisions would have had no bearing on the court's decision.

Petitioners here argue that the New York Court of Appeals statement that "whichever test ["least restrictive" or "exaggerated response"] is adopted, on this record the regulation as applied to plaintiff needlessly infringes on his beliefs, and cannot stand", 68 N.Y.2d at 925, is dicta as concerns the exaggerated response test, and was not essential to the decision. Therefore, they say, issue preclusion does not apply. But, the law is otherwise. As the Seventh Circuit said in Schellong v. I.N.S., 805 F.2d 655, 658 (7 Cir. 1986):"...a judgment which is based on alternative grounds is an effective adjudication as to both and is collaterally conclusive as to both." citing Irving National Bank v. Law, 10 F.2d 721, 726 (2d Cir 1926), See also 1B Moore's Federal Practice par. 0.443[5.-1] at p. 782.

Moreover, the Lewis court's holding was not dicta. It had to decide the question under the more strict standard, which the state was arguing applied to the case. If anything, the court's statement concerning application of the "least restrictive means" test was dicta, because it was not necessary for disposition of the case once the court found that under the exaggerated response test the haircut rule was unconstitutional.

The New York Court of Appeals found that the same evidence would support judgment for plaintiff under either stand-

ard. If that evidence satisfied the exaggerated response test, it must of necessity satisfy the Safley/Shabazz test.

POINT II

THE SECOND CIRCUIT'S DECISION CAREFULLY APPLIES THIS COURT'S PRECEDENTS TO THE EVIDENCE IN THE RECORD. THERE IS NO CONFLICT WITH DECISIONS FROM OTHER CIRCUITS.

Petitioner's argue that the constitutional issues should be reviewed by this Court for two reasons. First, they state that the Second Circuit failed to follow the appropriate analysis, as set forth in the Safley and Shabazz decisions. Petitioners also claim that the Circuit Court's opinion in this case is inconsistent with decisions rendered by other Circuit Courts. Neither argument justifies petitioners' conclusion that this case is worthy of the Court's review.

A. The Second Circuit correctly followed the Safley/Shabazz analysis

Under Safley/Shabazz, the court must weigh four factors when deciding whether prison policies are unconstitutional. These are: (1) whether there is a valid, rational connection between the regulation and a legitimate governmental interest; (2) any alternative means available to the prisoners for exercising the right; (3) the impact accommodation of the right will have on guards, other inmates and prison resources generally; and

(4) the existence of any ready alternatives for accommodating the right while still satisfying the government's interests.

In its opinion, the Second Circuit noted that its analysis was controlled by the standard set forth in Safley and Shabazz. The court listed all four factors identified in Safley, and applied them throughout its opinion, including those portions of it that are not subject to the instant petition (which dealt with religious services, headgear and diet). Rather than a failure by the court to apply the correct legal standard, petitioners' basic claim is really nothing more than dissatisfaction with the result reached by the court.

Petitioners argue that the Circuit Court did not address the first and third Safley/Shabazz factors. However, the court noted that it was "[a]ccepting the existence of reasonable security concerns", Benjamin, 905 F.2d at 576, thus ruling in petitioners' favor on the first factor. As to the third factor, impact accommodation, although the court did not specifically discuss its application, there is no reason to presume that it was ignored. It is much more reasonable to assume that the court considered the issue and concluded that it did not require reversal of the district court. In this Court, petitioners make no specific argument as to how application of the third factor even applies to this case, much less that it requires a different result from that reached below.

With respect to the second Safley/Shabazz factor, alternative means of exercising the right, petitioners argue that the Second Circuit erroneously looked beyond the bare fact of whether the prisoners were denied all right to practice their religion. However, Safley and Shabazz require a balancing of many criteria, and the extent of the deprivation should be a relevant factor. Those decisions do not hold that petitioners must be absolutely and completely deprived of all opportunity to observe their religion before they can succeed on any free exercise claim. Rather, the court stated that this factor will influence the degree to which the court should exercise deference to the views of the prison officials. Safley, at 90.

Petitioners argue that the court should have deferred to the views expressed by the Deputy Commissioner who testified at trial. However, this Court has never held that such deference must be complete. In Safley, the Court refused to defer to the prison authorities' claim that a ban on inmate marriages was necessary to preserve institutional security. Security claims can be disregarded when there is substantial evidence in the record that officials have exaggerated their response to those concerns. As this Court held in Safley, the existence of obvious, easy alternatives may be evidence that the regulation is *** an 'exaggerated response' to prison concerns." Id. at 90.

This is what occurred in the courts below. Respondents

were able to prove that the alternative procedure of photographing the prisoner with his hair pulled tightly back, away from his face, was adequate to satisfy petitioners' professed need. Such a photograph is as useful as one taken after a haircut in revealing the personal features that are useful in identifying fugitives.

Petitioners incorrectly argue that the Circuit Court placed the burden of proof on them. They rely solely on a statement in the opinion that noted that petitioners' arguments about the inadequacy of the alternative photographs had been rejected by the court. This does not show that the court shifted the overall burden of proof to petitioners any more than did this statement of the Court in Safley: "We are aware of no place in the record where prison officials testified that such ready alternatives would not fully satisfy their security concerns." Id. at 98.

When a prisoner is able to demonstrate the existence of an apparent ready alternative, the prison officials will have to explain why the alternative procedure is not adequate. If they totally fail to rebut the prisoner's evidence, or do so in an unconvincing manner, the court will be justified in holding the challenged procedure to be unconstitutional. However, this does not mean that the prisoner does not bear the ultimate burden of proving that the regulation is not reasonably related to legiti-

mate penological interests.

Petitioners state that the courts below improperly rejected their criticism of the alternative photographing procedure because it was unrebutted. Apparently, petitioners would have the courts blindly defer to any expression of security concerns. This Court's decisions do not go that far.

Although respondents did not call their own security expert, petitioners' witness was subject to cross-examination. Many photographs were used during his testimony, as he attempted to justify petitioners' policy. Respondents also introduced photographs that were shown to the witness, and which they believe demonstrated to the courts below that the alternative procedure suggested by them was equal in utility to that preferred by petitioners. The trial court was able to observe the witness as he testified, and it could properly find his testimony unconvincing. Furthermore, the court can rely on its own common sense in deciding the issues raised, Safley at 98. The trier of fact should be allowed to weigh all of the evidence and reach a reasoned conclusion as to whether the petitioners have exaggerated their response to security concerns.

The decision in this case is not an example of a court's failing to follow the precedents of this Court. The Courts below were well aware of their duties under the Safley/Shabazz standards. They carefully applied the law to the

facts that were presented at trial. This case does not present any important legal question worthy of this court's review.

B. The decision below does not conflict with those from other circuits.

Petitioners attempt to find a conflict with decisions from other circuits by pointing to cases where short hair regulations were upheld in the face of free exercise challenges. However, the cases petitioners rely on all involved markedly different rules than that challenged here. The rules in those cases all prohibited prisoners from growing their hair beyond a certain length during the term of their incarceration. The state interests justifying the adoption of such rules vary considerably from that advanced by petitioners to support their rule.

Petitioners say that a haircut is needed to obtain a picture of what the prisoner looks like with short hair. Petitioners then allow the prisoner to grow his hair to any length. Their stated concern is if the prisoner escapes and cuts off his hair to avoid detection, they will need a picture that can be used to identify him.

This is the only state interest put forward by petitioners. The decision below found that petitioners' interest could be fully protected using the alternative photographing procedure. This holding does not conflict with the decisions cited by petitioners because none of them considered the validity of this particular state interest. Conversely, the state inter-

ests that were raised in those cases are not advanced by petitioners here.

For example, in Pollack v. Marshall, 845 F.2d 656 (6th Cir. 1988), the following justifications were put forth in support of the rule prohibiting short hair: (1) advancing identification, both in prison and in the event of an escape, by making it difficult for a prisoner to change his appearance by cutting his hair; (2) preventing prisoners from hiding contraband in their hair; (3) reducing homosexual activity, on the theory that prisoners with long hair are more attractive; (4) eliminating safety problems around machinery; (5) preventing the clogging of drains with long hair; and (6) preventing infestation of lice. None of these concerns can be raised by petitioners because they allow prisoners to grow their hair to any length following the initial haircut.

Petitioners place particular emphasis on the Pollack court's statement that a person with long hair looks different than he does with short hair. The concern in that case was that a prisoner could suddenly change his appearance by cutting off his hair, so that someone familiar with how he looks would not immediately recognize him. The issue was not whether he could be identified with a certain type of photograph, but whether he would be recognized from memory. Petitioner's rules allow prisoners to change their appearance by cutting their hair, and the

only question is what type of photograph can be used to identify him by someone who does not know him personally.

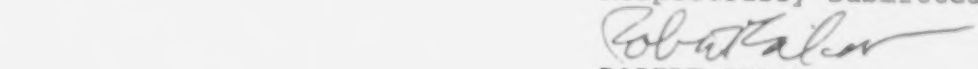
Even if there is a conflict between this case and Pollack, or any of the other cited cases, this would not present the type of conflict that requires resolution by this Court. The conflict would not be on a question of law, but only the application of settled law to similar factual circumstances. The law governing prisoners' free exercise rights is clear, and was recently stated by the Court. It is to be expected that there will be some differences in how separate jurisdictions decide how to apply the law to similar factual circumstances. This is because each case must be decided on the evidence put into the record by the parties. Also, different parties will have different strategies for trying even identical facts, which can legitimately produce varying results. Any "conflicts" produced by this process do not require resolution by this Court.

CONCLUSION

THE PETITION SHOULD BE DENIED.

Dated: September 28, 1990

Respectfully submitted,



ROBERT SELCOV
STEPHEN LATIMER
DAVID C. LEVEN
Prisoners' Legal Services of
New York
2 Catharine Street
Poughkeepsie, New York 12601
(914) 473-3810

Attorneys for Respondents